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Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 73.

THE OTIS COMPANY,
PLAINTIFF IN ERROR,

v.

THE LUDLOW MANUFACTURING COMPANY and THE LUDLOW CORDAGE COMPANY.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

Brief on Behalf of the Plaintiff in Error.

Statement of the Case.

This case comes before this court on a writ of error to the Superior Court of the state of Massachusetts, to review a final decree of that court in favor of the defendants in a suit in equity in which the plaintiff in error was plaintiff and the defendants in error were defendants. The Ludlow Manufacturing Company is referred to in this brief as the defendant. The parties to the suit are

manufacturing corporations organized under the laws of that state.

The plaintiff's bill of complaint was entered in the Superior Court of that state on the 15th day of October, 1901, to restrain the defendants from completing the erection of a dam across the Chicopee river, a non-navigable stream, and thereby flowing and injuring the land, mill-site, dam, water-mill, and water power of the plaintiff above and on the same stream.

Answers were filed by the defendants in error and issue joined.

The case was referred by the Superior Court to a master, who reported the facts, and ruled as a matter of law that the plaintiff was not entitled to relief.

As will be shown hereinafter by specific reference to the record, the facts, as found by the master, are as follows: —

The plaintiff, an owner of a large parcel of land, including the banks and bed of a non-navigable stream, on July 1, 1901, completed thereon the development of the natural fall of that stream on the land by a dam (called the lower dam), erected wholly on its land, which flowed only its land and did not violate the common law rights of any one, and on that date raised the waters of the stream by that dam and used them in working its water-mill, and applied electrical power thereby generated to driving the machinery of an ancient cotton mill of the plaintiff above and on the same site. The defendant on that date had a dam, called the Red Bridge dam, in process of construction across the river two miles below the plaintiff's dam, which dam of the defendant at no time before the 16th day of the following October was sufficiently advanced in construction to raise the waters of the

river or to flow or affect the land, mill, or water power of the plaintiff, but which when completed would flood the plaintiff's land and ruin the plaintiff's lower mill-site, and said water-mill and water power. The first occupation by the defendant of its mill-site was August 3, 1899, antedating any similar occupation by the plaintiff of its lower mill-site, but this occupation was of so ambiguous a character as not to indicate, either then or until long after the plaintiff's occupation of its lower mill-site, either the height of the dam which the defendant intended to build, or the extent to which it would set the waters back, or even that it would in any way affect or interfere with the plaintiff's enjoyment of its property. The defendant, even after it knew the plaintiff was considering the building of its dam, intentionally concealed and withheld from the plaintiff information or knowledge that the defendant's dam, when completed, would flow and injure the plaintiff's land, mill-site, mill, and water power.

As will be shown by specific reference to the record, the Superior Court, in accordance with the opinion of the Supreme Judicial Court, reported in the case at bar *Otis Co.* v. *Ludlow Mfg. Co. et al.*, 186 Mass. 89 (Record, p. 112), entered a decree in favor of the defendants on the ground that the flowing by the defendant was authorized by the Mill Act of that state, Pub. Sts. c. 190, and that that act was not repugnant to the due process of law clause of the 14th Amendment of the Constitution of the United States. (Record, pp. 102, 103, 112.)

The provisions of the Mill Act involved in the question of its constitutionality are the following sections of Public Statutes, c. 190: —

> "Sect. 1. Any person may erect and maintain a water-mill, and a dam to raise water for working it,

upon and across any stream not navigable, upon the terms and conditions and subject to the regulations hereinafter expressed.

"Sect. 2. No such dam shall be erected to the injury of a mill lawfully existing, either above or below it, on the same stream, nor to the injury of a mill-site on the same stream on which a mill or mill-dam has been lawfully erected and used, unless the right to maintain a mill on such last mentioned site has been lost or defeated by abandonment or otherwise; nor shall a mill-dam be hereafter erected or raised to the injury of any such mill-site which has been occupied as such by the owner thereof, if such owner within a reasonable time after commencing such occupation completes and puts in operation a mill for the working of which the water of such stream is applied; nor shall a mill or dam be placed on the land of any person without such grant, conveyance, or authority from the owner as would be necessary by the common law if no provision relating to mills had been made by statute.

. . . . . .

"Sect. 4. A person, whose land is overflowed or otherwise injured by such dam, may obtain compensation therefor upon his complaint before the superior court for the county where the land or any part thereof lies; but no compensation shall be awarded for damage sustained more than three years before the institution of the complaint.

"Sect. 5. The complaint shall contain such description of the land alleged to be flowed or injured, and such statement of the damage, that the record of the case will show with sufficient certainty the matter heard and determined therein.

. . . . . .

"Sect. 16. If they [the jury] find that the complainant is entitled to recover damages, they shall assess the amount of damages sustained within three years next preceding the institution of the complaint and to the time of the rendering of the verdict, and, if the verdict is allowed and recorded, the complainant shall have judgment and execution for the amount of damages so assessed.

. . . . . .

"Sect. 18. They [the jury] shall also ascertain and determine by their verdict what sum, if any, to be paid annually to the complainant, would be a just and reasonable compensation for the damages that may be thereafter occasioned by the dam, so long as it is used in conformity with the verdict; and also what sum in gross would be a just and reasonable compensation for all damages thereafter to be occasioned by such use of the dam and for the right of maintaining and using the same forever in manner aforesaid.

"Sect. 19. The complainant may in such case, at any time within three months after the verdict is allowed and recorded, elect to take the sum so awarded in gross for the right to maintain and use the dam forever, instead of receiving the annual compensation therefor; and if he makes such election, he shall within said three months cause the same to be entered on the record of the case in the clerk's office.

"Sect. 20. The owner or occupant of the mill or dam shall, within three months after such election is thus entered, pay to the complainant, or secure to his satisfaction, said sum with interest from the time of the verdict. After the expiration of said three months, and until payment of said damages and

interest, such owner or occupant shall lose all benefit of the provisions contained in this chapter.

"Sect. 21. If the complainant does not within said three months cause such entry of his election to be made on the record, he and all persons claiming under him shall, so long as the dam is kept up and maintained, be entitled to demand and receive from the owner and occupant of the mill the annual compensation so established by the jury, unless the sum is increased or diminished upon a new complaint as hereinafter provided.

"Sect. 22. The person entitled to receive said annual compensation or gross damages shall have a lien therefor, from the time of the institution of the original complaint, on the mill and mill-dam with their appurtenances, and on the land under and adjoining the same and used therewith; but such lien shall not extend to any sum due more than three years before the commencement of an action therefor.

"Sect. 23. Such person may maintain an action of contract therefor in the superior court against the person who owns or occupies the mill when the action is brought, and shall in such action recover the whole sum due and unpaid for the three years then last past, whoever has owned or occupied the mill during that time; and he shall be entitled to full costs, although the sum recovered does not amount to twenty dollars.

"Sect. 24. The execution issued on such judgment may, at any time within thirty days after the judgment is rendered, be levied on the premises so subject to the lien; and the officer may thereupon proceed to sell such premises, or so much thereof as is necessary to satisfy the execution and all charges of levying it.

The officer shall proceed in making the sale in like manner in all respects as is provided with regard to the sale on execution of a right to redeem real estate mortgaged, and the sale shall be valid and effectual against all persons claiming the premises by any title that has accrued within the time covered by the lien.

. . . . . .

"Sect. 28. No action shall be sustained at common law for the recovery of damages for the erecting, maintaining, or using of a mill or mill-dam, except as is provided in this chapter."

The state constitution contains the following provisions: —

"And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor."

Constitution of Mass., part 1, art. X.

"And further full power and authority are hereby given and granted to the said general court from time to time to make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this Commonwealth and for the government and ordering thereof and of the subjects of the same."

Constitution of Mass., part 2, c. 1, sec. 1, art. IV.

In advance of the discussion of this case, we venture to express the belief that a careful examination of the Mill Act in question will lead to the conclusion that, as interpreted by the state court in the case at bar in palpable disregard of a long uninterrupted line of its decisions, this Mill Act is clearly unconstitutional, within the Federal rule and even within the decisions of those state courts by which somewhat similar statutes have been upheld.

The facts in detail are as follows: —

At the date of the filing of the plaintiff's bill, the plaintiff was the owner of the land therein described (Bill of Complaint, Record, p. 21; Master's Report, Record, p. 41), including the bed of a mill stream called the Chicopee river, which flows through said land. (Master's Report, Record, pp. 42–44; Exhibit marked "Plan of land of Otis Company, by J. K. Barker.")

There was then on this land a cotton mill of the plaintiff, called the upper mill, which it had owned and operated since 1872 by use of water power created by a dam at said mill, called the upper dam, supplemented since 1891 by steam power. (Master's Report, Record, pp. 33, 41.)

And on the same land three fourths of a mile below the cotton mill there was then the plaintiff's lower dam, which is the one flowed by the defendant's dam, and which is the one hereinafter referred to as plaintiff's dam. (Master's Report, Record, p. 41.)

The plaintiff's dam is built wholly on plaintiff's land across a mill stream (Master's Report, Record, p. 33; Exhibit marked "Plan of land of Otis Company, by J. K. Barker"), and flows only the land of the plaintiff (Master's Report, Record, pp. 40, 41), including land formerly a part of a highway which was relocated and discontinued

September 4, 1900 (Master's Report, Record, pp. 40, 65, 76), and conveyed to the plaintiff. (Master's Report, Record, p. 42.)

The plaintiff's dam violated no common law rights of the defendants. (Master's Report, Record, p. 76.)

The elevation of the plaintiff's dam is 278 and 29/100 feet; the height thereof is 19 and 29/100 feet; and the net ordinary working head not less than 18 nor more than 18 and 56/100 feet. (Master's Report, Record, pp. 32, 33.)

In the five wettest months of the average year the flow of the stream, with a net head of 18 feet afforded by this dam, furnishes 1952 horse power for a run of twenty-four hours. (Master's Report, Record, p. 34.)

The plaintiff's dam and water-mill connected therewith, with water wheels and electrical machinery installed, constituting one unit of power, was completed and put in use on the 1st day of July A.D. 1901. From that time, with immaterial exceptions, the waters of said stream have been kept raised by said dam and used in working said water wheels and generating electrical power transmitted to, and used in working, the plaintiff's cotton mill above. The water-mill is constructed for the installation of three additional similar units which will utilize all the water power developed. (Master's Report, Record, p. 34.)

The cost of the lower dam and water-mill therewith connected was $271,000. (Master's Report, Record, p. 38.)

The plaintiff needs, for the present and future working of its cotton mill, all water power developed by said dam. (Master's Report, Record, p. 74.)

"On Sept. 26, 1882, the plaintiff was operating its

cotton mill, and owned the entire south bank of the river from this mill to the Shearer lot, which is marked No. 7 on the plan dated February, 1902, hereinafter mentioned, and Metcalf owned the south bank below the Shearer lot, called the Sprague lot, and marked on said plan 'Metcalf privilege,' and at that time the Otis Company, the plaintiff, owned the north bank, being lot No. 1 on said plan extending from said dam to the Barker lot, No. 5 on said plan, and Metcalf owned the north bank just below the Barker lot, called the Green lot; the Otis Company at the same time owned to the thread of the stream on both sides between its upper mill dam and the Barker lot, and owned to the thread of the stream on the south side of the river between lot No. 1 and the lower line of the Barker lot, and from the lower line of the Barker lot to the Shearer lot the Otis Company owned to the thread of the stream on both sides, but did not own the bank on the north side of the river, and it did not then own the land conveyed to it by Honorah A. Dunn, on a part of which a portion of its lower dam is erected." (Master's Report, Record, p. 42. See copy of plan annexed to this brief.)

The plaintiff in 1882, in pursuance of an agreement in writing with Metcalf, acquired title to the Shearer lot and conveyed to Metcalf, by deed dated March 14, 1883, the part of the Shearer lot lying below the stake mentioned in said agreement; and Metcalf at the same time conveyed to the Otis Company, in pursuance of said agreement, all that portion of the Green lot on the other side of the river, lying above a point in range with said stake, being lot No. 6 in said plan. (Master's Report, Record, pp. 43, 44.)

The land acquired from Metcalf, with what the plaintiff then owned and land shortly after conveyed to it by Barker and by Dunn, comprises the plaintiff's land described in its bill of complaint.

Said agreement provided that —

> "Sixth. Said Metcalf or his assigns shall not construct a dam in the development of his or their power which shall afford more than 21 32/100 feet fall, and said company or its assigns shall not construct a dam in the development of its or their power which shall afford more than 19 65/100 feet fall or such portion of the supposed total fall of 40 97/100 feet as 21 32/100 bears to 19 65/100." (Master's Report, Record, p. 44.)

Or, in other words, that neither party should build a dam which would interfere with the natural fall of the stream through the other's land. (Master's Report, Record, p. 44.)

In 1898 the plaintiff, needing additional power at its cotton mill, considered the development of the lower fall, and an expert whom it employed in that behalf advised that a further utilization of the fall developed by the upper dam would supply the power then required, but expressed the opinion that the lower fall was a very valuable property in view of the future requirements of the plaintiff's plant. (Master's Report, Record, p. 62.)

In March and April, 1900, the plaintiff had the development of its lower privilege under consideration. (Master's Report, Record, p. 64.)

The plaintiff determined to build its dam on the 4th day of April, 1900, and began the work of excavating for the foundations of this dam on the 11th day of August,

1900. It prosecuted both the preparatory work and construction of the dam and water-mill with due diligence until the same were completed, and the power developed was actually applied to working its cotton mill on July 1, 1901. (Master's Report, Record, pp. 34, 40.)

To prevent its water rights from being grabbed by the defendant, the plaintiff at first determined to build an inexpensive dam which it could complete very quickly. (Master's Report, Record, pp. 70, 71, 73.)

We now come to the history of the defendant's dam, called the Red Bridge dam. It will be interesting to observe the facts upon which it relies for a taking by due process of law.

In 1898, prior to October, the defendant had determined to erect a dam on the site of the Red Bridge dam, two miles below the plaintiff's dam, but had not determined on the height thereof. (Master's Report, Record, pp. 37, 38.)

On December 3, 1898, the defendant purchased the premises conveyed by the plaintiff to Metcalf as aforesaid and paid him therefor the sum of $15,000, taking the deed, however, in the name of the Ludlow Cordage Company. (Master's Report, Record, p. 58.)

At that time the defendant owned the land between the site of the Red Bridge dam and the premises so purchased. (Master's Report, Record, p. 41.)

> "The deed from Metcalf to the Ludlow Cordage Co. was procured by the Ludlow Manufacturing Co. The land described therein was purchased by the Ludlow Manufacturing Co. for its own purpose, namely, the development of additional water power, and paid for with its own funds. The existence

and terms of said agreement between the Otis Co. and Metcalf was, at the time of procuring said deed, known to the Ludlow Manufacturing Co., and this deed was taken by the Ludlow Manufacturing Co. in the name of the Ludlow Cordage Co., in part for the purpose of concealing the true ownership of said property and evading the obligations imposed upon Metcalf and his assigns by the 6th article of the Metcalf agreement. The Ludlow Manufacturing Co. is in equity the real owner of said property and retains title in the name of Ludlow Cordage Co. for the purposes above stated." (Master's Report, Record, pp. 47, 48.)

False entries showing the Cordage Company indebted to the defendant for $2000, on account of the land conveyed by Metcalf to the Cordage Company, which was not flowed by the dam, were made by the defendants in their books. (Master's Report, Record, pp. 59, 60.)

In January, 1899, the defendant, having determined to erect a dam on the present site of the Red Bridge dam, employed a civil engineer to make the preparatory surveys, plans, and estimates. (Master's Report, Record, pp. 38, 75.) Immediately thereafter the engineer commenced the work of preparing for the building of the dam and development of the water power. (Master's Report, Record, p. 38.)

On the 3d day of August, 1899, the defendant began the construction of said dam by beginning the construction of the tail race thereof (Master's Report, Record, pp. 38, 75), and the excavation of the tail race, commenced on August 3, 1899, was the first act of occupation by the defendant of its mill-site (Master's Report, Record, pp. 38,

75); but this excavation and the defendant's occupation of its mill-site had progressed on April 4, 1900, only to the extent of making, as part of the tail race, an excavation from 8 to 10 feet deep, 25 to 30 feet long, 12 to 15 feet wide, and of stripping some of the soil on the side of the proposed dam. The stripping was commenced on March 30, 1900, and was not sufficient to indicate to a person not an engineer experienced in the construction of dams, the height of the proposed dam or the extent to which it would set back the water of the stream. (Master's Report, Record, p. 64.)

As late as September 20, 1900, no part of the defendant's construction was above the natural surface of the ground, except that soil had been thrown up three feet on one side of a trench and eight feet on the other. (Master's Report, Record, p. 66.)

This work did not indicate even then that the plaintiff's land would be flowed.

A representative of the defendant, early in 1899, made inquiries of a representative of the plaintiff as to the boundary line between the Metcalf land and the plaintiff's land. (Master's Report, Record, p. 61.)

On March 24, 1900, and again on the 7th day of the following April, a representative of the defendant was informed by a representative of the plaintiff that the plaintiff was thinking of developing its water power on its lower privilege. (Master's Report, Record, p. 64.) The defendant intentionally refrained from informing the plaintiff that the defendant intended to build a dam which would flow the plaintiff's land until April 11, 1900, when, in reply to a direct inquiry (made April 7, 1900) as to how far the defendant intended to flow back, the defendant sent its engineer, who informed the plaintiff that the Red

Bridge dam, when completed, would flow and destroy the plaintiff's lower privilege. It was the purpose and intention of the defendant not to communicate or inform the plaintiff of the defendant's intention to build a dam which would flow the plaintiff's land, and this purpose and intention were not abandoned until April 11, 1900. (Master's Report, Record, pp. 62, 63.)

Neither the plaintiff nor any employee thereof had knowledge or notice prior to April 4, 1900, that any one intended to erect a dam which would flow its land or injuriously affect its lower privilege (Master's Report, Record, p. 63), and the first knowledge or notice was merely that which might or would be inferred from a letter of April 3, 1900, communicating the approximate intended height of the defendant's dam, received from one Barker, who had accidentally seen plans of it, and thought from the height thereof that it might injuriously affect the plaintiff. (Letter of Barker, Master's Report, Record, p. 63.)

The defendant, on the 16th day of October, 1901, completed the erection of the dam on its land across said stream at a point two miles below the plaintiff's dam (Master's Report, Record, pp. 36, 38, 42), and of the water-mill therewith connected, with an installation of water wheels and electrical machinery, all at a cost of $800,000. (Master's Report, Record, pp. 36, 38, 42.)

This dam has an elevation of 272.61 feet; a height of 51 feet; a roll way of 300 feet, and an ordinary net working head of 50 feet. The elevation of the bottom of its gate opening is 260.61 feet, and the bottom of the canal is from 7½ to 10 inches higher than the surface of water on the tail race of the plaintiff's dam when the plaintiff's wheels are running. (Master's Report, Record, pp. 36, 39.)

In the five wettest months of an average year the flow of the stream at the defendant's dam, under a head of 50 feet, would give a twenty-four hour run of 5485 80/100 horse power. (Master's Report, Record, p. 37.)

The defendant's dam flows the waters of the stream back on the land of the plaintiff between the plaintiff's dam and the lower boundary of its land, *flooding the land and also interfering with the working of the water wheels of the plaintiff, and diminishing — in fact, ruining — the power development of the plaintiff*, and a reference to the plan will show that but for the plaintiff's lower dam the defendant's dam would flow the plaintiff's land far above it. With the water raised to the crest of the defendant's dam, the plaintiff loses at least 12 88/100 feet of the fall on its land which it has developed wholly on its land.

The gross head remaining at plaintiff's dam without a flashboard, when water is raised at defendant's dam, is 5 68/100 feet. (Master's Report, Record, pp. 35, 36.)

In other words the defendant has appropriated a portion of the plaintiff's land and 12.88 feet of the developed natural fall of the stream on the plaintiff's land.

The development of the defendant was to be used to generate electricity to work the defendant's new mill, devoted to the manufacture of fabrics, about four miles below its dam. (Master's Report, Record, pp. 36, 39, 42.)

> "The Ludlow Manufacturing Company commenced both the preliminary, preparatory, and permanent work of building its said dam before the plaintiff began its preliminary, preparatory and permanent work of building its said dam; and the Ludlow Manufacturing Company commenced the work of constructing its said dam before the plaintiff commenced the work of constructing its said dam.

"The plaintiff completed its said dam before the Ludlow Manufacturing Company completed its said dam.

"The plaintiff raised the waters of said river, by its said dam as aforesaid, and used them in working the water wheels of said unit as aforesaid, and by electrical power generated and transmitted as aforesaid, worked said portions of its said cotton mill as hereinbefore stated before the completion of the defendant's said dam and before the waters of said river were raised by the defendant's said dam." (Master's Report. Record, p. 40.)

Upon these facts the plaintiff claimed, —

"1. That said clause of the statute [Pub. Sts. c. 190, sec. 2] does not authorize the owner of a mill-site, who has first commenced to occupy it as such, by first preparing to erect, or by first commencing to erect, a mill-dam, and who builds and puts in operation a mill in accordance with said clause, to complete the erection of such a dam and thereby raise the waters of the stream so as to flow and injure an upper mill-site on said stream, the owner of which upper mill-site had first completed thereon the erection of a mill-dam and thereby raised the waters of said stream and used them in working a water-mill before the lower dam was completed or used to raise said water.

"2. That if said section 2 does authorize the owner of such lower mill-site to flow and injure an upper mill-site, under the circumstances stated in the last stated request, then said section is in violation of the Constitution of the United States and of the Constitu-

tion of Massachusetts." (Plaintiff's Requests 1, 2, Master's Report, Record, p. 76.)

The defendant claimed that the facts found by the master constituted a valid prior appropriation by it of the water power of the plaintiff (Master's Report, Record, p. 76), and that the plaintiff was not entitled to relief, and made the following requests: —

"1. Upon the facts found and agreed and the law in the case, the appropriation by the Ludlow Manufacturing Company of the power comprehended by its present development at Red Bridge was prior to any appropriation by the Otis Company at its so-called lower privilege.

"2. Upon the law and the facts found and upon the facts agreed to, the Ludlow Manufacturing Company first occupied its mill-site as such.

"3. Prior to the time the Otis Company commenced the erection of its dam, the mill-site of the Ludlow Manufacturing Company had been occupied as such by said Ludlow Manufacturing Company.

. . . . . .

"36. Upon the pleadings and the evidence the plaintiff is not entitled to any relief." (Requests of Defendant 1, 2, 3, 36, Record, pp. 76, 80.)

The plaintiff objected and excepted to the master's report because the master did not find or rule as follows, ~~as requested by plaintiff~~: —

"1. Said Red Bridge dam, erected by the Ludlow Manufacturing Company, was erected in violation of section 2 of Public Statutes, chapter 190, to the injury of an existing water-mill of the plaintiff on the same stream.

"2. Said Red Bridge dam was erected by the Ludlow Manufacturing Company in violation of said section 2, to the injury of the mill-site of the plaintiff on the same stream, which had been and was occupied as such by the plaintiff at the time said Red Bridge dam was erected.

"3. Said lower dam of the plaintiff was not erected in violation of said section 2, to the injury of any mill-site of the defendants or either of them existing on the same stream.

"4. Said lower dam of the plaintiff was not erected in violation of said section 2, to the injury of any mill-site of the defendants or either of them occupied as such by them or either of them.

"5. Said Red Bridge dam was erected by the Ludlow Manufacturing Company in violation of the rights of the plaintiff.

. . . . . .

"7. If said section 2 provides that a riparian proprietor, by beginning to occupy his land for the erection of a dam thereon with which to raise the waters of a non-navigable stream for the working of a water-mill, or by beginning to erect thereon a dam for such working, shall acquire the right to thereafter complete such dam and to thereby raise the waters of the stream and flow and injure the mill-site of an upper proprietor and his existing water-mill thereon in actual operation at and prior to the time such lower dam is completed and the waters of said stream thereby raised, and to thereby destroy the water power of such upper proprietor developed and actually used in working said upper mill at and prior to said time, — such provision is contrary to the 14th Amendment of

the Constitution of the United States and void, in that it authorizes depriving a person of his property without due process of law." (Record, pp. 81, 91, 92.)

The plaintiff further objected and excepted to the master's report—

Because the master gave the first ruling requested by the defendants; viz., —

"1. Upon the facts found and agreed and the law in the case, the appropriation by the Ludlow Manufacturing Company of the power comprehended by its present development at Red Bridge was prior to any appropriation by the Otis Company at its so-called lower privilege." (Record, pp. 76, 80, 83, 93.)

Because the master gave the second ruling requested by the defendants; viz., —

"2. Upon the law and the facts found and upon the facts agreed to, the Ludlow Manufacturing Company first occupied its mill-site as such." (Record, pp. 76, 80, 83, 93.)

Because the master gave the third ruling requested by the defendants; viz., —

"3. Prior to the time the Otis Company commenced the erection of its dam, the mill-site of the Ludlow Manufacturing Company had been occupied as such by said Ludlow Manufacturing Company." (Record, pp. 76, 80, 83, 93.)

"Because the master ruled that the plaintiff is not entitled to relief." (Record, pp. 80, 94.)

The Superior Court reserved the case on the master's report for the determination of the Supreme Judicial Court, and on the 1st day of July A.D. 1904, judgment was entered in the Superior Court in accordance with the opinion of the Supreme Judicial Court. (Record, pp. 102, 103, 112.)

And thereupon the plaintiff in error sued out this writ in error. The assignment of errors, twenty-one in number, present the question —

Does the Mill Act as interpreted by the state court violate the due process of law clause of the 14th Amendment of the Constitution of the United States?

Assignment of Errors.

The following errors were assigned (Record, pp. 104–107): —

"1. Said Superior Court erred in dismissing the plaintiff's bill of complaint.

"2. Said Superior Court erred in not ruling, deciding and decreeing that said Red Bridge dam was unlawfully erected by the defendant Ludlow Manufacturing Company in violation of the rights of the plaintiff.

"3. Said Superior Court erred in not ruling, deciding and decreeing that the plaintiff was entitled to have said dam abated so as not to flow and injure the said mill-site, mill, water power and property of the plaintiff.

"4. Said Superior Court erred in not ruling, deciding and decreeing that the plaintiff was entitled to relief in equity against the erection and maintenance of the dam of the Ludlow Manufacturing Company, to wit, said Red Bridge dam.

"5. Said Superior Court erred in ruling and deciding that said statute [Pub. Sts. c. 190] is not in conflict with the clause of the said 14th Amendment to the Constitution of the United States forbidding any state to deprive any person of property without due process of law.

"6. Said Superior Court erred in ruling and deciding that said statute does not deprive the plaintiff of its property without due process of law in violation of the said 14th Amendment of the Constitution of the United States.

"7. Said Superior Court erred in ruling and deciding that said statute and said occupation of said Red Bridge mill-site and said erection and maintenance of said Red Bridge dam by said Ludlow Manufacturing Company does not deprive the plaintiff of its property without due process of law in violation of the said 14th Amendment of the Constitution of the United States.

"8. Said Superior Court erred in ruling and deciding that said statute and said commencement of said occupation of said Red Bridge mill-site by said Ludlow Manufacturing Company does not deprive the plaintiff of its property without due process of law in violation of the said 14th Amendment of the Constitution of the United States.

"9. Said Superior Court erred in ruling and deciding, that inasmuch as the taking of the property of the plaintiff under the authority of the aforesaid statute was under the police powers of said state, the plaintiff was not entitled to the title, right, privileges and immunities secured by the aforesaid clause of said 14th Amendment to persons deprived of their property.

"10. Said Superior Court erred in ruling and decid-

ing that the erection and maintenance of said Red Bridge dam, under the authority of aforesaid statute, by said Ludlow Manufacturing Company, so as to flow and injure said mill-site, mill, water power and property of the plaintiff, did not entitle the plaintiff to just compensation for the damages to the plaintiff for its property so taken as required by due process of law under the aforesaid 14th Amendment.

"11. Said Superior Court erred in ruling and deciding that said statute makes due provision for just compensation for the property of the plaintiff taken thereby and by authority thereof as required by due process of law under the aforesaid 14th Amendment.

"12. Said Superior Court erred in ruling and deciding that the provisions of said statute for the determination and payment of damages to the plaintiff for its property taken by virtue of or under the authority of said statute are a sufficient provision for just compensation to the plaintiff as required by due process of law under the aforesaid 14th Amendment, and are not in conflict with said clause of said Amendment.

"13. Said Superior Court erred in ruling and deciding that the provisions of said statute for compensation to the plaintiff for damages sustained by the erection and maintenance of said Red Bridge dam, under the authority of said statute, are adequate to meet the requirements of said clause of the aforesaid 14th Amendment, even though said statute does not require or provide just compensation to the plaintiff for the property taken.

"14. Said Superior Court erred in ruling and deciding that the requirements of said statute, for the determination and payment of damages to the plain-

tiff for its property taken under and by authority of said statute, are a sufficient provision for just compensation to the defendants as required by due process of law under the aforesaid 14th Amendment.

"15. Said Superior Court erred in ruling and deciding that due process of law under said 14th Amendment does not require that the act of appropriating or taking the plaintiff's property under the police power of the state should be clear and intelligible.

"16. Said Superior Court erred in ruling and deciding that the occupation by the Ludlow Manufacturing Company of the Red Bridge mill-site under the authority of said statute, although so ambiguous and unintelligible as not to indicate that any appropriation of the water power, property or rights of the plaintiff had been or was to be made, entitled the Ludlow Manufacturing Company to thereafter erect and maintain said Red Bridge dam in accordance with the provisions of said statute so as to flow out and injure the said dam, mill-site, mill and water power of the plaintiff, and that said statute and such authority was not repugnant to the aforesaid clause of the 14th Amendment.

"17. Said Superior Court erred in ruling and deciding that the commencement of the occupation of said Red Bridge mill-site by said Ludlow Manufacturing Company under the authority of said statute, although so ambiguous and unintelligible as not to indicate that any appropriation of the water power, property or rights of the plaintiff had been made or was to be made, was a valid appropriation of the water power, property and rights of the plaintiff whereby the Ludlow Manufacturing Company acquired a right to

thereafter erect and maintain said Red Bridge dam in accordance with the provisions of said statute so as to flow out and injure the said dam, mill-site, mill and water power of the plaintiff, and that said statute and such authority was not repugnant to the aforesaid clause of the 14th Amendment.

"18. Said Superior Court erred in ruling and deciding that the said commencement of the construction of said tail race on August 3, 1899, by said Ludlow Manufacturing Company, under the authority of said statute, although so ambiguous and unintelligible as not to indicate that any appropriation of the water power, property or rights of the plaintiff had been or was to be made, entitled the Ludlow Manufacturing Company to thereafter erect and maintain said Red Bridge dam in accordance with the provisions of said section so as to flow out and injure the said dam, mill-site, mill and water power of the plaintiff and that said statute and such authority was not repugnant to the aforesaid clause of the 14th Amendment.

. . . . . .

"20. Said Superior Court erred in not ruling and deciding that the said statute and the said acts of said Ludlow Manufacturing Company under the authority thereof deprived the plaintiff of its property without due process of law in violation of said clause of said 14th Amendment.

"21. Said Superior Court erred in not ruling and deciding that said statute is repugnant to said clause of said 14th Amendment, in that the provisions of said statute for compensation to the plaintiff for the property of which it was deprived under the authority of said statute are not reasonably certain and adequate."

Argument.

Under the main question — does the Mill Act as interpreted by the state court violate the due process of law clause of the 14th Amendment of the Constitution of the United States — the plaintiff submits the following propositions: —

I. In Massachusetts a proprietor of land through which a natural watercourse flows has a common law right, as owner of such land, to the natural flow of the stream through his land, its descent and all force to be derived therefrom, for any hydraulic purposes to which he may see fit to apply it.

II. The right of the plaintiff to use its land for general purposes, and its right as a riparian proprietor to make use of the stream for hydraulic purposes, are property rights within the meaning of the due process of law clause of the 14th Amendment.

III. Whether an interference with property rights is the taking of property within the due process of law clause of the 14th Amendment, is a Federal and not a local question.

IV. Flowing the land of another under the authority of a Mill Act or other statute so as to deprive the owner of riparian rights, or so as to exclude him from the beneficial use of the land itself, or taking the right so to flow by such authority, is a taking of property within the due process of law clause entitling the owner to compensation.

V. The Mill Act (Mass. Pub. Sts. c. 190), printed on page 153 of this brief, authorizes depriving a person of property without due process of law within the meaning of the 14th Amendment, because, as interpreted by the state court, it authorizes the taking of the property of another without notice to the owner thereof, by acts of

occupation, like the making of the excavation in the present case, so unintelligible and ambiguous as to utterly fail to indicate how much of the property of the owner was or is to be taken, or even that any of his property is to be injuriously affected.

VI. This Mill Act also violates the 14th Amendment because it does not make adequate provision for just compensation to the owner thereof for property taken under the authority of said act.

VII. The Massachusetts Mill Act violates the 14th Amendment because it authorizes the taking of private property for private purposes.

The Supreme Judicial Court of Massachusetts, in deciding in the case at bar that the statute was constitutional, made the following inaccurate statement of the plaintiff's contention:—

> "The plaintiff contends that the statute so construed is unconstitutional. We do not deem it necessary to consider at length the constitutionality of this statute. It has often been considered and discussed in previous decisions, and it has uniformly been affirmed. It is urged that the provision for the payment of damages is inadequate. *This argument is founded mainly on an assumption that there is a taking of property under the right of eminent domain;* but whatever may be the interference with the use of neighboring property by an appropriation of a mill-site, it is not a taking under the right of eminent domain." (Opinion of the Supreme Judicial Court, Record, p. 116.)

In order to avoid any misapprehension on this point we

beg leave to refer to a duly certified copy of the plaintiff's brief in the state court on file with the clerk of this court, and to propositions of the plaintiff stated on page 3 thereof, as well as to the plaintiff's claim on following pages, that the question whether an interference with a landowner's rights is a taking of property within the meaning of the 14th Amendment is a Federal one, and that such taking "must be by due process of law whether it be under the police power of a state or by right of eminent domain for strictly public purposes" (State Court Brief, p. 34); and further, on pages 35 and 36 of the brief, that the 14th Amendment requires that such taking should be clear and intelligible.

Whether the state court considered or failed to consider the Federal questions raised by the record is immaterial. These questions were in fact presented by the record and argued by the plaintiff, and the judgment in the case, adverse to the plaintiff, necessarily involved a decision either that there had been no taking of the plaintiff's property in a Federal sense or that there was within the meaning of the 14th Amendment a valid taking under a statute making an adequate provision for compensation.

A refusal or failure to consider a Federal question is equivalent to a decision against the Federal right involved therein.

> *Erie R.R. Co.* v. *Purdy*, 185 U.S. 148.
> *Des Moines Nav. & R. Co.* v. *Iowa Homestead Co.*, 123 U.S. 552.

If it appear from the record, by clear and necessary intendment, that the Federal question must have been directly involved, so that the state court could not have

given judgment without deciding it, that will be sufficient to give jurisdiction.

Powell v. *Brunswick Co.*, 150 U.S. 433.

In the case at bar, as in *Kaukauna Water Power Co.* v. *Green Bay & M. Canal Co.*, 142 U.S. 254, the state court could not have reached a conclusion adverse to the plaintiff in error without holding either that the rights taken were not the property of the plaintiff, or that it was not entitled to compensation therefor, which is equivalent to saying that it had not been deprived of its property without due process of law.

I.

In Massachusetts a proprietor of land through which a natural watercourse flows has a common law right, as owner of such land, to the natural flow of the stream through his land, and its descent, and all force to be derived therefrom, for any hydraulic purposes to which he may see fit to apply it.

If the Chicopee river were a navigable stream, the plaintiff would be entitled to relief, for the Mill Act authorizes the erection and maintenance of a dam only across non-navigable streams.

Murdock v. *Stickney*, 8 Cush. 113.

The Chicopee river is a small non-navigable stream emptying into the Connecticut river, also a non-navigable stream.

Bardwell v. *Ames*, 22 Pick. 333.

The state court in the case at bar put its decision on the ground that the stream was one within the scope of the

Mill Act; that the Mill Act was constitutional, and that the defendant's dam was authorized by it. The state court takes judicial notice of the non-navigability of a stream within the limits of the state.

Commonwealth v. *Chapin*, 5 Pick. 199–201.
Commonwealth v. *King*, 150 Mass. 221.
Olive v. *State of Alabama*, 86 Ala. 88.

The finding of the master that the plaintiff owns to the thread of the stream on both sides, *i.e.*, the bed and banks, is a finding that the stream is non-navigable.

A reference to the cases will show that the owner of land through which a non-navigable stream flows owns the bed of the stream, and has the right to the exclusive use of the waters of the stream, as it flows through the land, for domestic and hydraulic purposes; that no one has a right to fish in the stream within the limits of his land; that no one has a right to pollute the waters of the stream so as to render them unfit for his use as they flow through his premises; that no one has a right to divert the waters of the stream from his premises, nor to back the waters of the stream so that they will flow his land or interfere with the use of the fall or force of the stream through his land. These rights are private rights, for the infringement of which, by any person, the riparian owner may maintain an action for damages — or in proper cases a bill in equity for an injunction, or in cases of an obstruction in the stream on the land of another, causing the water to flow back upon his premises, he may enter upon such other's land and abate the nuisance thereby occasioned.

The right of each proprietor, therefore, is equal at common law, not in the sense that it is free to any one of them by first erecting a dam to flow or use the land of another,

or by first making a use of the waters of the stream to acquire an exclusive right of user, but in the sense that the owner of each parcel of land is entitled to use on his land the waters of the stream without diverting the stream from other owners or flowing it back upon their lands or interfering with their use by polluting it. These rights of the riparian owner are just as much the property of the owner as the land itself of which it is a part, and to the same, and no greater extent, are subject to the right of eminent domain and the exercise of the police powers.

A reference to the cases will fully support the foregoing statements.

In Massachusetts a river above the ebb and flow of the tide is a non-navigable river, and a riparian proprietor thereon owns to the thread of the stream, subject to the right of the public to pass in boats if the river be in fact boatable, and, like other property, subject to a constitutional exercise of the police powers of the state.

Ingraham v. *Wilkinson*, 4 Pick. 268–271.
Commonwealth v. *Chapin*, 5 Pick. 199–201.
Rowe v. *Granite Bridge*, 21 Pick. 344.
Hopkins Academy v. *Dickinson*, 9 Cush. 544.
McFarlin v. *Essex Co.*, 10 Cush. 304–309.
Commonwealth v. *Vincent*, 108 Mass. 441, 447.

A riparian proprietor on a non-navigable stream has the exclusive private right to the use of its waters as they flow through his land, and such right is parcel of the land and as sacred as the right to the soil over which they flow.

Watuppa Reservoir Co. v. *Fall River*, 147

Mass. 548, at 560, 561; (s.c.) 154 Mass. 305.

Fitch v. *Stevens*, 4 Met. 426.

King v. *King*, 7 Mass. 496.

Ingraham v. *Wilkinson*, 4 Pick. 268–271.

Commonwealth v. *Chapin*, 5 Pick. 199.

Bardwell v. *Ames*, 22 Pick. 333.

Williams v. *Nelson*, 23 Pick. 141, 142.

Johnson v. *Jordan*, 2 Met. 234, 239.

Pitts v. *Lancaster Mills*, 13 Met. 156, 158.

Knight v. *Wilder*, 2 Cush. 199, 208.

Commonwealth v. *Alger*, 7 Cush. 53, 97.

Bates v. *Weymouth Iron Co.*, 8 Cush. 548.

Elliott v. *Fitchburg R.R.*, 10 Cush. 191.

McFarlin v. *Essex Co.*, 10 Cush. 304.

Hill v. *Sayles*, 12 Cush. 454.

Russell v. *Russell*, 15 Gray, 159–161.

Tourtellot v. *Phelps*, 4 Gray, 370, 376.

Pratt v. *Lamson*, 2 Allen, 275.

Merrifield v. *Lombard*, 13 Allen, 16.

Drake v. *Hamilton Woolen Mill Co.*, 99 Mass. 574–581.

Commonwealth v. *Vincent*, 108 Mass. 441, 446, 447.

Merrifield v. *Worcester*, 110 Mass. 216.

Lund v. *New Bedford*, 121 Mass. 286, 290.

Dwight Printing Co. v. *Boston*, 122 Mass. 583.

Clapp v. *Herrick*, 129 Mass. 292.

Whitney v. *Wheeler Cotton Mills*, 151 Mass. 396–405.

Washburn & Moen Co. v. *Worcester*, 153 Mass. 494.

Maynard v. *Northampton*, 157 Mass. 218.
Fales v. *Easthampton*, 162 Mass. 422.
Sprague v. *Dorr*, 185 Mass. 10.

The property right established by these and other Massachusetts cases is stated by Mr. Justice KNOWLTON in *Watuppa Reservoir Co.* v. *Fall River*, 147 Mass. 548, at pages 560 and 561, as follows: —

> "The usufruct of water in a watercourse is inherent in the ownership of the land through which the water flows. It is often the principal element of value in the real estate of which it is a part. Lord WENSLEYDALE says, in *Chasemore* v. *Richards*, 7 H.L. Cas. 349, 382: 'It has now been settled that the right to the enjoyment of a natural stream of water on the surface, *ex jure naturæ*, belongs to the proprietor of the adjoining lands, as a natural incident to the right to the soil itself, and that he is entitled to the benefit of it, as he is to all the other natural advantages belonging to the land of which he is the owner.' Chief Justice SHAW, in *Johnson* v. *Jordan*, 2 Met. 234, 239, uses these words: 'Every person, through whose land a natural watercourse runs, has a right, *publici juris*, to the benefit of it, as it passes through his land, to all the useful purposes to which it may be applied. . . . It is inseparably annexed to the soil, and passes with it, not as an easement, nor as an appurtenance, but as parcel.' In *Gardner* v. *Newburgh*, 2 Johns, 162, 165, Chancellor KENT says: 'A right to a stream of water is as sacred as a right to the soil over which it flows. It is a part of the freehold of which no man can be disseised but by lawful judgment of his peers, or by due

process of law. This is an ancient and fundamental maxim of common right to be found in Magna Charta.'

"The permanent deprivation of this right is a taking or destruction of property, and a diversion of water from a stream, so as to prevent its running in its natural course, is within the constitutional provision for the protection of property. As against riparian proprietors below, not even the State can authorize it without a provision for their compensation. This doctrine rests upon a principle of universal law, recognized from the earliest times, not only in this country and in England, but in continental Europe. It is established by such a weight of authority that it is no longer fairly open to question."

In that case, *Watuppa Reservoir Co.* v. *Fall River*, 147 Mass. 548, the state, being the owner of the waters of a great pond which it held in trust for public uses, granted to the city of Fall River the right to take and use the waters for domestic purposes without making compensation to riparian proprietors on the outlet of the pond for a substantial diversion of the waters in pursuance of the grant. The proprietors brought a bill in equity to restrain such diversion. At the first trial of that case it appeared that the riparian proprietors held their lands under a grant from the state, province, or colony, which did not purport to convey the waters of the pond. The court, in a majority opinion, held that such grant did not pass any right to the pond or its waters, that the rules of the common law governing ordinary streams did not apply to that case, and ordered the bill to be dismissed. It did, however, at page 554, state the common law rule of riparian proprietorship

in substantial accordance with the language of Mr. Justice KNOWLTON, who delivered a dissenting opinion to the effect that the case was within the ordinary rules. In a subsequent trial of the same case it appeared that the state had parted with the title to the pond before the colonial ordinance was enacted, and the court held that the state could not, without compensation, authorize the diversion complained of, and granted the injunction.

Watuppa Reservoir Co. v. *Fall River*, 154 Mass. 305.

The following are some of the cases in which it is said that the right to fish in a non-navigable stream is the exclusive right of the riparian proprietor, from the enjoyment of which the public are excluded, and for an infringement of which the owner can maintain a common law action of trespass: —

Ingraham v. *Wilkinson*, 4 Pick. 268, 271.
Commonwealth v. *Chapin*, 5 Pick. 199.
Commonwealth v. *Alger*, 7 Cush. 53, 97.
McFarlin v. *The Essex Co.*, 10 Cush. 304, 309.
Russell v. *Russell*, 15 Gray, 159.

The nature of this private right of fishery and its subordination to the police powers is thus stated in *Commonwealth* v. *Chapin*, *ubi supra* (cited in *Swift* v. *Falmouth*, 167 Mass. 115, 120):

> "It does not appear by the facts reported, or by the verdict, whether at the place where the dam is built the river is navigable or not; we may take it for granted, however, that the place is above the flowing and ebbing of the tide, and that being the case, it is

not a navigable river there, within the meaning of the term navigable as understood by the common law. The doctrine of Lord HALE, as laid down in his treatise De Jure Maris, has been approved of and adopted as the law of England, of New York, Connecticut, and of this Commonwealth; and he divides rivers into two classes, navigable and not navigable. They are considered navigable where the tide ebbs and flows, and not navigable above that point. The former belong to the sovereign or public, the latter may be the subject of private property. In the former, the fishery is common to all the subjects, under such restraints as the government may impose; in the latter, it belongs to the owners of the soil adjoining to and under the river; for the owner of the land is owner to the thread of the river, *usque ad filum medium aquæ*. *Vide* Hargr. Law Tracts, 6, 7, 8; Davies's Rep. 152; *The People* v. *Platt*, 17 Johns, R. 209; *Adams* v. *Pease*, 2 Connect. R. 481; *Carter* v. *Murcot*, 4 Burr. 2162. . . .

"The right of passage and of transportation upon rivers not strictly navigable, belongs to the public, by the principles of the common law; but the right of fishery remains unrestricted, *so that each proprietor of the land adjoining has a several or exclusive right of fishery in the river, immediately before his land, down to the middle of the river, and may prevent all others from participating in it, and will have a right of action against any who shall usurp the exercise of it without his consent.*

"And yet it appears that this common law right of several fishery in the owners of land bordering on rivers not navigable, is subject to a reasonable quali-

fication, in order to protect the rights of others, who, in virtue of owning the soil, have the same right, but might lose all advantage from it, if their neighbors below them on a stream or river might with impunity wholly impede the passage of fish into the lakes or ponds, where they by instinct prepare for the multiplication of the species. This restriction is founded upon that universal principle of every just code of laws, *Sic utere tuo ut alienum non lædas.* Upon the same principle, that the exclusive property in the banks and bed of a river is subject to the public easement on the waters, the right of several fishery is limited to the taking of fish, but does not carry with it the right to hinder the passing of them above, that other owners may be prevented from enjoying a similar privilege."

The following are some of the cases in which it is held that at common law a riparian owner has a private right that the waters of a non-navigable stream shall not be polluted by others so as to interfere with his reasonable use of the same for proper purposes, and that for an infringement of that right he has a remedy at law and equity: —

Merrifield v. *Lombard*, 13 Allen, 16.
Merrifield v. *Worcester*, 110 Mass. 216.
Dwight Printing Co. v. *Boston*, 122 Mass. 583.
Washburn & Moen Co. v. *Worcester*, 153 Mass. 494.
Sprague v. *Dorr*, 185 Mass. 10.

The leading case in Massachusetts, *Merrifield* v. *Lombard*, 13 Allen, 16, was a bill in equity setting forth that

the defendant had thrown into a stream corrosive substances which corroded the plaintiff's engines and boilers in a factory on the banks below. It appeared that the plaintiff's factory was built since the use commenced.

The court, in its opinion, said, —

"The case, as made by the bill, answer and agreed facts, establishes a clear invasion of the plaintiff's right by the defendant. The law requires of a party through whose land a natural watercourse passes, that he should use the water in such manner as not to destroy, impair or materially affect the beneficial appropriation of it by the proprietors of land below on the same stream. Each riparian owner has the right to use the water for any reasonable and proper purpose, as it flows through his land, subject to the restriction that he shall not thereby deprive others of a like use and enjoyment of the stream as it runs through their land. Any diversion or obstruction of the water which substantially diminishes the volume of the stream, so that it does not flow *ut currere solebat*, or which defiles and corrupts it to such a degree as essentially to impair its purity and prevent the use of it for any of the reasonable and proper purposes to which running water is usually applied, such as irrigation, the propulsion of machinery, or consumption for domestic use, is an infringement of the right of other owners of land through which a watercourse runs, and creates a nuisance for which those thereby injured are entitled to a remedy. An injury to the purity or quality of the water, to the detriment of other riparian owners, constitutes, in legal effect, a wrong and an invasion of private right, in like man-

ner as a permanent obstruction or diversion of the water. It tends directly to impair and destroy the use of the stream by others for reasonable and proper purposes."

The following are some of the cases in which it is held that at common law a riparian proprietor has a right to have the waters of a stream flow to him without an unreasonable diversion and can maintain an action of tort for damages occasioned by a violation of such right or a bill in equity to restrain it: —

Newhall v. *Ireson*, 8 Cush. 595.
Lund v. *New Bedford*, 121 Mass. 286.
Dwight Printing Co. v. *Boston*, 122 Mass. 583, 589.
Wamesit Power Co. v. *Allen*, 120 Mass. 352.
Warren v. *Spencer Co.*, 143 Mass. 9.
Watuppa Reservoir Co. v. *Fall River*, 154 Mass. 305.
Hollingsworth & Vose Co. v. *Foxborough Water Supply Co.*, 165 Mass. 186.
Lexington Print Works v. *Canton*, 171 Mass. 414.

Lund v. *New Bedford*, *ubi supra*, was an action of tort for diverting the water of Acushnet river above the plaintiff's dam. The defendant justified its acts as having been done for the purpose of supplying the city with pure water under the St. of 1863, c. 163. The city had failed to file a statement of taking as required by statute.

In that case the court said, —

"In the action of Lund, the plaintiff can maintain his action, although, upon the evidence reported, he

can recover only nominal damages. He is the owner of the mill and privilege. He has agreed to convey the estate to the plaintiffs in the other action, and they are in occupation of it, but until the conveyance they occupy it as his tenants, and the reversion is in him. For any temporary trespass, which injures only the present enjoyment of the estate, he cannot recover. But for any injury to his reversion he is entitled to maintain an action.

"It is a settled rule, that where an act is done which violates the rights of any one, and which is of such a nature that, if it be continued for a sufficient period of time, the wrongdoer may acquire a title by adverse possession or presumption of a grant, the person whose rights are violated may maintain an action therefor without proof of any other actual damages. *Hastings* v. *Livermore*, 7 Gray, 194. *Elliott* v. *Fitchburg Railroad*, 10 Cush. 191. *Newhall* v. *Ireson*, 8 Cush. 595. *Webb* v. *Portland Mfg. Co.*, 3 Sumner, 189. In this case, the defendant has constructed permanent conduits and other works for the purpose of supplying the city with water, and has withdrawn and is constantly withdrawing large quantities of water to the injury of the plaintiff's mill privilege, under a claim of right. If its acts are acquiesced in for a sufficient length of time, it might give the defendant a title by adverse possession. For this invasion of his right, the plaintiff Lund may maintain an action without proof of other actual damage."

The following are some of the cases in which it is held that a riparian proprietor has a private right to use the natural fall of the stream as it passes through his land for

hydraulic purposes, and that he may maintain an action of tort for damages, or a bill in equity to enjoin the continuance of the obstruction to the flow, or may enter upon the premises of the wrongdoer and abate the nuisance.

Williams v. *Nelson*, 23 Pick. 141, 142.
Hill v. *Sayles*, 12 Met. 142; (s.c.) 4 Cush. 549; (s.c.) 12 Cush. 454.
Tourtellot v. *Phelps*, 4 Gray, 370–376.
Pratt v. *Lamson*, 2 Allen, 275.
Smith v. *Agawam Canal*, 2 Allen, 355.
Brigham v. *Wheeler*, 12 Allen, 89, 90.
Drake v. *Hamilton Woolen Co.*, 99 Mass. 574, 581.
Clapp v. *Herrick*, 129 Mass. 292.
Otis Co. v. *Ludlow Mfg. Co.*, 186 Mass. 89.
Ludlow Mfg. Co. v. *Indian Orchard Co.*, 177 Mass. 61.

The common law rule is thus stated in *Tourtellot* v. *Phelps*, 4 Gray, 370–376:

"*It may be proper to state the familiar rule of law in this commonwealth, which is that each proprietor of land through which a natural watercourse flows has a right, as owner of such land, and as inseparably connected with and incident to it, independently of the mill acts and of all grants and agreements with other proprietors above or below, to the natural flow of the stream through his land, and its descent, and all the force to be derived therefrom, for any hydraulic purpose to which he may think fit to apply it.* But, in order that each may enjoy this right, every one is bound to use it reasonably as it passes through

his own land, so as not to injure the equal right of all other proprietors. He shall not poison or corrupt the water; he shall not wholly divert, or hold it back unreasonable lengths of time, or let it down in unreasonable quantities. What is reasonable, under all circumstances, must depend much upon the character of the stream, its relative position, the usage of the country, and the state of the arts, not necessary to be stated for the present purpose. This is the natural and inherent right of each riparian proprietor, and passes with it as parcel of the estate. If either relinquishes any portion of his own right or acquires that of another, it must be by grant or prescription, that is by contract, actual or presumed."

Setting the waters back is actionable as a violation of a private right, even though unaccompanied by actual damages.

HOLMES, C.J., in *Ludlow Mfg. Co.* v. *Indian Orchard Co.*, 177 Mass. 61.

"It is very clear, that to raise a dam on one's own land by which the water is set back on another's without grant from the latter, would be a tort, for which case would lie. If such a dam is continued twenty years, without action, complaint, or protest, on the part of the land-owner, it is evidence of a right, and as such right may be and often is acquired by grant, it is taken to be presumptive evidence of a grant and may be so pleaded."

Williams v. *Nelson*, 23 Pick. 141, 142.
Brigham v. *Wheeler*, 12 Allen, 89.

The difference between the private property right of the

riparian proprietor to use the natural fall of the stream for power and his right as one of the public to use the stream for boating is clearly shown in *Blood* v. *Nashua & Lowell Railroad Corporation*, 2 Gray, 137, in which it was held, as stated in the head note, that —

> "A railroad corporation, building a bridge across a stream, are liable for the damage thereby occasioned to the owners of a saw-mill above, by the obstruction of the stream so as to prevent the water from passing off from his mill as freely as it had previously; but are not liable for the damage suffered by him by being impeded and put to increased expense in getting logs up the stream to his mill, whether the stream be navigable for boats and rafts, or not."

In the opinion of the court, delivered by SHAW, C.J., it is said, at pages 139, 140, —

> "The question is, whether the awards of damages are founded on correct legal principles, and whether the report can be accepted. In considering it, we must take notice that there are two classes of rights which may be had in rivers, streams and watercourses in this commonwealth.
>
> "Every person owning land, through or along which a watercourse passes, has a right, as inseparably incident to his estate, to the beneficial use of the stream in its passage, in its natural channel, for all purposes for which it can be usefully applied, to supply his cattle, to irrigate his land, and the like; and if the fall be sufficient, he may use it as a mill power. It follows of course that no riparian proprietor higher up has a right to divert or corrupt it, or render it unfit for use; and no riparian proprietor below has a right to

obstruct its free passage off, or to set it back upon the mill or land of such owner.

"But there is another right, in rivers and watercourses, for navigation, boating and rafting. The rule of the common law is, that waters are not navigable, unless within reach of the ebb and flow of the tide. But it has often been held here, that the public have a right to the use of the large rivers, and indeed of all rivers and watercourses, suitable for boats and rafts, and in that sense they are deemed navigable, though above the ebb and flow of the tide. In these, there is a right of way for boats and rafts. *Commonwealth* v. *Charlestown*, 1 Pick. 180. *Commonwealth* v. *Chapin*, 5 Pick. 199.

. . . . . .

"Perhaps the case does not disclose facts enough to enable us to judge, whether that section of Stony Brook, lying between the plaintiff's mills and the Merrimack River, is or is not navigable for rafts and boats. But we have not thought that question material; for, if it is not navigable in this sense, then the plaintiffs had no right to use it for boats and rafts, the loss they sustain in getting logs through it is *damnum absque injuria*. But supposing it to be navigable for boats and rafts, (the supposition most favorable to the plaintiffs), they cannot maintain this action because such obstruction would be a public, not a private nuisance; it would be a violation of the public right, not of the plaintiffs' private right. The obstruction of a public right of way is a public, not a private wrong; it may affect those near the obstruction much more than the rest of the public; but the damage sustained by those near it differs in degree only, not

in kind. It is a wrong therefore, if it be one, to be redressed by a public prosecution, not by recovering damages in a private action."

See also *Blackwell* v. *Old Colony R. Co.*, 122 Mass. 1.

In *Fuller* v. *Chicopee Mfg. Co.*, 16 Gray, 43, the court, overlooking the distinction between the common law rights of a riparian proprietor and his rights under the Mill Act, and mistaking the scope of two cases cited in its opinion, held that a riparian proprietor whose unimproved land, flowed under the Mill Act, had a value of $33.84 for agricultural purposes, and of $733.34 for mill purposes, was entitled to damages only for the smaller sum.

In its opinion the court say, with reference to the mill acts,—

"They only substituted, in the place of the common law remedies, a more simple, expeditious and comprehensive mode of ascertaining and assessing damages to persons whose lands were overflowed or otherwise injured by the erection and maintenance of dams on the same stream, for the purpose of creating a water power and carrying mills. It follows that, as a riparian proprietor could recover at common law no damages occasioned to an unimproved or unappropriated mill site by the erection of a dam and mill on the same stream below, he cannot maintain a complaint under the mill acts to recover similar damages."

It is apparent, however, that the Mill Act takes away the common law right of the land owner to abate a dam which

flowed his land as well as his right to have the flowing enjoined by a court in equity.

In support of this decision the opinion cited *Hatch* v. *Dwight*, 17 Mass. 289, and *Cary* v. *Daniels*, 8 Met. 466.

In *Hatch* v. *Dwight* the action was trespass for flowing the plaintiff's mill-site. The Mill Acts were then in force, and the court, in its opinion, said that a mill owner had a right to flow an upper unimproved mill-site. This statement, however, was of the rule under the Mill Act (not of the common law rule) as stated by the court in *Hill* v. *Sayles*, 12 Met. 142, at page 147; viz., —

> " 'No action shall be sustained at common law, for the recovery of damages, for the erecting, maintaining or using any mill or mill dam, except as is provided in this chapter.' (Rev. Sts. c. 116, sec. 30.) This clause is to be construed in connexion with all the other provisions of the chapter. It has been truly said that all the statutes on this subject, being *in pari materia*, must be taken together, and so construed, if practicable, as to make a harmonious system. The clause in question prohibits any action at common law, except as is provided in the same chapter; and it may be that in terms no action is therein given, in a case like this. But that which arises by necessary implication from the statute is as effectually excepted, as if it had been so in terms. *The clause in question was manifestly intended to give the sanction of a positive enactment to a principle long since adopted, in* Stowell *v.* Flagg, *11 Mass. 364, that when a mill dam was rightly erected and maintained, conformably to the statute, no action at common law would lie. This was necessary to give to mill owners the security*

and quiet which the statutes designed to afford. But in the same case, it is distinctly intimated, that if the terms of the statute are not complied with, as where the dam is kept up at a season of the year prohibited by the verdict and judgment, the mill owner shall have no benefit of the statute, *but be liable, as if it had not been passed, to a suit at common law, for the disturbance.*"

And again in *Fitch* v. *Stevens*, 4 Met. 426, 428, the court said, —

> "These laws have been continued with various modifications for more than a century, having the same end in view, namely, the protection of mill owners in the enjoyment of heads of water necessary to drive their mills, subject to the claim for damages for overflowing the neighboring lands. And it was decided in this court, in the case of *Stowell* v. *Flagg*, 11 Mass. 364, after a careful and able examination of these statutes, that no action, since the St. of 1795, c. 74, would lie at common law against a mill owner for flowing the land of another."

The statute of 1795, c. 74, was one of the early mill acts, and will be found on page 144 of this brief.

In *Cary* v. *Daniels*, the second case cited in the opinion in *Fuller* v. *Chicopee*, *ubi supra*, SHAW, C.J., after stating the common law right of a riparian proprietor, and declaring that a lower proprietor cannot obstruct the stream so as to throw it back upon the mills or lands of the proprietor above, continued, —

> "We, of course, now speak of rights at common law

independent of any modification thereof by statute. And one of the beneficial uses of a watercourse, and in this country one of the most important, is its application to the working of mills, and machinery, a use profitable to the owner and beneficial to the public. It is therefore held," etc.

He then proceeded to state the rule of priority of occupation by flowage under the Mill Act, without referring to the act in terms.

In *Gould* v. *Boston Duck Co.*, 13 Gray, 442, Chief Justice SHAW, in stating the modification of the common law rule by the Mill Acts, clearly distinguished between the common law rule and the statutory privilege, in the following language: —

"This rule is, that every proprietor of land through which a watercourse runs has a right to the use of the impelling course of the current, or what is more familiarly called the head and fall of the current, for mill purposes, so far as they exist on his own land, if there be any such head and fall within his own limits. If the water flows at nearly a level, there will be no such available head and fall. If the descent be very rapid, there will be such head and fall, and of course mill sites or privileges, at short distances from each other. If the descent be gentle and regular, and the land of a proprietor not extensive, the head and fall on his own land may be quite insufficient for practical use, for mill purposes. This latter consideration probably led to an early modification of the common law in Massachusetts, by a provision that such a proprietor might erect a dam on his own land and raise a

head of water to his own best advantage, although it might raise the water in the bed of the river beyond and above the limits of his own land; notwithstanding it might flow back, by such rise in the bed of the river, upon the land of other proprietors — *with a provision for a compensation in damages.*

"These provisions have effected a change in the common law to this extent: By the common law, the rights of each successive riparian proprietor to the reasonable use of the mill power of the stream are equal; each has a right to a reasonable use of it as it passes through his own land only, with a right incident thereto to erect such dams, canals, sluices, and water ways, as to fit it for the actual working of mills. By the right given by the mill acts to any proprietor to flow back beyond his own limits, the common law is changed to some extent. Before any mills are erected, the right of each proprietor is the same; it is a right to appropriate the power of the stream, by the actual erection of a mill, though the head and fall within the limits of his own land are insufficient, and in order to get sufficient head he raises his dam so as to flow beyond his own limits. The necessary consequence is, that when one proprietor, under the common right, has in fact appropriated the power, the proprietor below is so far restricted in his right of appropriation, that he cannot erect a mill on his own land, and flow back the water, to the destruction of the mill already erected by authority of law. This priority of first possession necessarily arises from the nature of appropriation; where two or more men have an equal right to appropriate, and where the actual appropriation by one necessarily excludes all others,

the first in time is the first in right. *Cary* v. *Daniels*, 8 Met. 466."

The distinction is also clearly drawn in *Smith* v. *The Agawam Canal Co.*, 2 Allen, 355, 356, in which it is said that at common law a riparian proprietor —

"cannot lawfully divert or diminish the quantity of water which would otherwise descend to the proprietors of lands below, or throw it back upon the lands of those above. . . .

"But under our statutes, any person may erect and maintain a water-mill, and a dam to raise water for working it, across any stream which is not navigable; and for this purpose may lawfully flood the lands of all persons over which the water will be caused to flow by keeping up and maintaining the dam. This privilege, however, is given subject to the prescribed conditions and restrictions; one of which, among many others, is, that no such dam shall be erected to the injury of any mill lawfully existing either above or below it on the same stream. Gen. Sts. c. 149, sections 1, 2, *et seq.* Rev. Sts. c. 116; St. 1795, c. 74.

"From these provisions it is an inevitable implication, that, although the right is given indiscriminately to all riparian proprietors, he who first erects and establishes his mill does, by his priority of occupation, acquire to that extent a title to the use of the water in the stream prior and superior to that of any other person, and a right to maintain his dam against all proprietors of lands both above and below his own. *Cary* v. *Daniels*, 8 Met. 466."

Fuller v. *Chicopee*, *ubi supra*, however, concedes the right of a riparian owner to recover all damages caused by flowage excepting the diminution in value of his land caused by the destruction of or injury to an undeveloped fall thereon.

While *Fuller* v. *Chicopee* denies to the owner of an unoccupied mill-site (vacant land) compensation for such diminution in value, the statement therein contained, that such owner could not maintain an action at common law for all damages occasioned by flowage, is opposed to the authority of every other case in Massachusetts on the subject, and that case has never been cited by the courts of that state until Mr. Chief Justice KNOWLTON, in the opinion in the case at bar, included it in a general citation of cases which were inconsistent with it.

It is interesting in this connection to again quote the language of Mr. Justice KNOWLTON in *Watuppa Reservoir Co.* v. *Fall River*, 147 Mass. 548–560, with reference to the right to use the natural fall of a stream:

> "The usufruct of water in a watercourse is inherent in the ownership of the land through which it flows. It is often the principal element of value in the land of which it is a part. . . .
>
> "The permanent deprivation of this right is a taking or destruction of property, and a diversion of water from a stream, so as to prevent its running in its natural course, is within the constitutional provision for the protection of property. As against riparian proprietors below, not even the State can authorize it without a provision for their compensation. This doctrine rests upon a principle of universal law, recognized from the earliest times, not only in this country

and in England, but in continental Europe. It is established by such a weight of authority that it is no longer fairly open to question."

The common law rights of a riparian owner to use his land and the stream flowing through it without the interference of back water are distinctly conceded by the state court in the case at bar.

Otis Co. v. *Ludlow Mfg. Co.*, 186 Mass. 89–95. (Record, p. 116.)

A riparian owner whose land has an inherent market value by reason of its adaptability for creating a water power by flowing the land of another under the Mill Act is entitled to recover damages on account of the loss in market value in that respect caused by the taking of the waters of a stream flowing through his land.

Fales v. *Easthampton*, 162 Mass. 422, 425.

The authorities cited both before and after the decision in *Fuller* v. *Chicopee* clearly establish the common law right in Massachusetts of a riparian proprietor to use the natural fall of the stream through his land for hydraulic purposes, as well as his common law right to abate an obstruction flowing his land and interfering with such use, to recover damages caused by such obstruction, and to have the continuance of the same enjoined by a court in equity.

It is interesting to note in this connection the decisions of other courts:

"The water power to which a riparian proprietor is entitled consists of the fall in the stream when in its natural state, as it passes through his land, or

along the boundary of it, or in other words, it consists of the difference of level between the surface where the stream first touches his land, and the surface where it leaves it. This natural power is as much the subject of property as is the land itself, of which it is an accident, and it may in the same way be occupied in whole, or in part, or not at all, without endangering the right, or restricting the mode of its enjoyment, . . . and as to a right by prior appropriation, that has regard to the quantum of water withdrawn from a stream common to both parties, and not to the quantum of fall."

M'Calmont v. *Whitaker*, 3 Rawle, 84, at page 90.

"The right of enjoying this flow without disturbance, interference or material diminution by any other proprietor, is a natural right, and is an incident of property in the land, like the right the proprietor has to enjoy the soil itself, without molestation from his neighbors. The right of property is in the right to use the flow, and not in the specific water."

Lancey v. *Clifford*, 54 Me. 487, 490.

"The owner of land has rights to the use of a private stream running over his land, peculiar to himself as owner of the land, not derived from occupancy or appropriation, and not common to the whole community. It is the right to the natural flow of the stream. Of this right he cannot be deprived by the mere use or appropriation by another, but only by grant or by the use or occupancy of another for such

a length of time as that therefrom a grant may be presumed."

Davis v. *Fullers*, 12 Vt. 178, 190.
Parker v. *Hotchkiss*, 25 Conn. 321.
Keeney v. *Wood Mfg. Co.*, 39 Conn. 576.
Heath v. *Williams*, 25 Me. 209.

In *Spring* v. *Lowell*, 1 Mass. 423, 430, SEDGWICK, J., said, —

"It may be observed that the sacred rights of private property are never to be invaded but for obvious and important purposes of public utility. Such are the things necessary to the upholding of mills. Hence the legislature have authorized mill owners to invade the property of their neighbors, even real property, which by our laws seems to be regarded as the most inviolable, so as to render it wholly useless by overflowing it with water whenever the same shall be *necessary* to the beneficial occupation of the mills. This invasion of private property is authorized only by statute, and in no case but from *necessity* for the attainment of the objects intended."

II.

The right of the plaintiff to use its land for general purposes, and its right as a riparian proprietor to make use of the stream for hydraulic purposes, are property rights within the meaning of the due process of law clause of the 14th Amendment.

Of course the constitutional rights of the plaintiff with respect to lot No. 6 bordering on the stream, conveyed to

it by Metcalf, are not less than its constitutional rights with respect to lot No. 10 conveyed to it by Powell which does not extend to the stream.

The plaintiff, under the decisions of the state court, had the private right at common law, to the exclusion of all others, whenever it saw fit to do so, to use its land, and also to make use on its land of the natural fall of the stream within the limits thereof (12.88 feet of which has been taken by the defendant) for hydraulic purposes, and the enjoyment of this and other rights was secured to it under the decisions of the state court, by remedies at law and in equity, and by the further right to enter on land of another and remove any obstruction in the stream which flowed the water back upon its land.

While a riparian owner is not entitled to compensation for damages or annoyance caused by the exercise of the sovereign or police powers of a state in a manner which does not violate the owner's private rights, —

Barney v. *Keokuk*, 94 U.S. 324;
Northern Trans. Co. v. *Chicago*, 99 U.S. 635;
Eldridge v. *Trezevant*, 160 U.S. 452;
Gibson v. *United States*, 166 U.S. 269;
St. Anthony Falls Water Power Co. v. *St. Paul*, 168 U.S. 349;
Scranton v. *Wheeler*, 179 U.S. 141;
Bedford v. *United States*, 192 U.S. 217,

yet such owner cannot, even under such sovereign or police powers, be deprived of his rights without compensation.

Yates v. *Milwaukee*, 10 Wall. 497.

Pumpelly v. *G.B. & M. Canal Co.*, 13 Wall. 166.

~~*Head v. Amoskeag Mfg. Co.*, 113 U.S. 9.~~
~~*Kaukauna W.P. Co. v. G.B. & M. Canal Co.*, 142 U.S. 254.~~

United States v. *Lynah*, 188 U.S. 445.

These are the same rules this court applies to land.

Mo. Pac. R. v. *Nebraska*, 164 U.S. 403.
Meyer v. *Richmond*, 172 U.S. 82.

The fact that the plaintiff had not improved the lower portion of its mill privilege at the time when the defendant dug a hole on land two miles below, does not withdraw the plaintiff's property from the protection of the 14th Amendment.

The capacity of unimproved or unoccupied property for improvement for agricultural, commercial, or hydraulic purposes is property under both the Federal and state law.

We refer to the language of the courts in cases cited.

"So far as water was diverted from its natural course, or from the uses to which the riparian owner would otherwise have been entitled to devote it, such owner is undoubtedly entitled to compensation."

Kaukauna Water Power Co. v. *G.B. & M. Canal Co.*, 142 U.S. 254, 276.

"Upon the question litigated in the court below, the compensation which the owner of the land condemned was entitled to receive, and the principle upon which the compensation should be estimated,

there is less difficulty. In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be, what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated." . . .

Boom Co. v. *Patterson*, 98 U.S. 403, 407.

"It is not the present use, but the possibilities of use which determine the value of property. Can the owner of vacant land have it taken from him without compensation simply because at the moment he does not use it?"

Chicago &c. R.R. Co. v. *Chicago*, 166 U. S. 226, 260.

"The framers of the constitution intended to protect rights which are worth protecting; not mere empty titles, or barren insignia of ownership, which are of no substantial value. If the land, 'in its corporeal substance and entity' is 'property,' still, all that makes this property of any value is the aggregation of rights or qualities which the law annexes as incident

to the ownership of it. The constitutional prohibition must have been intended to protect all the essential elements of ownership which make 'property' valuable. Among these elements is, fundamentally, the right of user, including of course the corresponding right of excluding others from the use."

Eaton v. *B.C. & M. R.R.*, 51 N.H. 504, 512.

Property is the right of any person to possess, use, enjoy, and dispose of a thing.

Wynehamer v. *The People*, 13 N.Y. 378, 396.

"What then is the nature of the damage which an owner of land may sustain from the erection and maintenance of such a dam? It is a work authorized by law, and by a law which recognizes the right of the legislature to take private property for public use, on paying an adequate compensation therefor, and provides for its exercise; so that it is not unlawful, its erection is not a nuisance, and its maintenance is not the continuance of a nuisance. It is permanent and perpetual in its nature. It is done for the purpose of raising and maintaining water to a certain height, and the damage, which that may do to adjacent land, will be permanent. It not only deprives the owner of the products and profits of the land, but by permanently changing its condition, it deprives it of the capacity for future cultivation and improvement. It therefore deprives the land, in whole or in part, of its actual, present exchangeable value; and such loss or diminution of value is the measure of the owner's damage. *It may be that the land has never yielded any profit; it may be swamp or morass; but*

if capable of being drained, subdued and cultivated, it is of value; and depriving it of that capacity for improvement is a loss to the owner. And these considerations are all to be taken, by those who are called on to assess such damages."

Heard v. *Middlesex Canal*, 5 Met. 81, 85.

"The depriving one of the beneficial use of his lands is, in the sense of the law, a taking of his lands. It would be very clear in the case of flowing."

Mill Corp. v. *Newman*, 12 Pick. 467, 482.

"In estimating the value of that which is taken they may consider all the uses to which it might properly have been applied if it had not been taken. In like manner, the effect on that which is left should be estimated in reference to all the uses to which it was naturally adapted before the taking. Damages are not to be awarded in reference to the peculiar situation or circumstances or plans of the owner, or to the business in which he happens to be engaged; but any and all of the uses to which the land considered as property may profitably be applied, whether contemplated by the owner or not, may well be taken into account by the jury."

Maynard v. *Northampton*, 157 Mass. 218, 219.

In *Fales* v. *Easthampton*, 162 Mass. 422, the court held that in determining the damages suffered by an owner of a mill-site it was competent for the jury to consider not only its value in connection with water power existing at the time of the taking, but also in connection

with the water power which might be acquired by flowing the lands of upper riparian proprietors under the Mill Act.

The fact that a water power has never been utilized does not deprive the riparian owner from recovering compensation for damages to the same when the water is taken for municipal purposes.

Baxter v. *Rutland*, 67 Vt. 607, 608.

In the present case the plaintiff's water power existed on the plaintiff's land, and the development thereof by the plaintiff flows only the plaintiff's land.

The cases cited fully establish the plaintiff's property rights to the land which was flowed, and to the use of the natural fall of that land in connection with the water of the stream.

III.

Whether an interference with property rights is a taking of property within the due process of law clause of the 14th Amendment, is a Federal and not a local question.

~~*Hollingsworth* v. *Texas*, 17 Fed. Rep. 109.~~
~~*Pumpelly* v. *Green Bay & M. Canal Co.*, 13 Wall. 166.~~
~~*Head* v. *Amoskeag Mfg. Co.*, 113 U.S. 9.~~
Chicago, B. & Q. R.R. v. *Chicago*, 166 U.S. 226, 241
Mo. Pac. Ry. Co. v. Nebraska 164 U.S. 403
Smyth v. Ames 169 U.S. 466.

Flowing the land of another under the authority of a Mill Act or other statute so as to deprive the owner of riparian rights, or so as to exclude him from the benefi-

cial use of the land itself, or taking the right so to flow by such authority, is a taking of property within the due process of law clause of the 14th Amendment, entitling the owner to compensation.

Flowing the land of another is such a taking.

Pumpelly v. *Green Bay & M. Canal Co.*, 13 Wall. 166.
Head v. *Amoskeag Co.*, 113 U.S. 9, 26
United States v. *Lynah*, 188 U.S. 445.
Mill Corp. v. *Newman*, 12 Pick. 467, 478, 482.
Sinnickson v. *Johnson*, 17 N.J. L. 129.
Eaton v. *B.C. & M. R.R.*, 51 N.H. 504.
Arimond v. *Canal Co.*, 31 Wis. 316.
Lee v. *Pembroke Iron Co.*, 57 Me. 481, 488.
Ingram v. *Water Co.*, 98 Me. 566, 572.

The case of *Manigault* v. *Springs*, decided by this court December 4, 1905, recognizes the rule of *United States* v. *Lynah*, and *Pumpelly* v. *Green Bay & M. Canal Co.*, *ubi supra*, to the effect that flowing is a taking which demands compensation when subsatntial damages result.

It is difficult to see how the 14th Amendment can require compensation to be made to a riparian proprietor for a loss or damage of fifty thousand dollars caused by flowing his land and deny compensation to another riparian proprietor for a trifling loss of fifty dollars caused in the same manner and by the same act, or how the adoption of such a rule can fail to lead to a discrimination in favor of the owners of large possessions. But whether the test of constitutional rights to compensation depends upon the amount of loss or the violation of private rights, is immaterial in the case at bar because, to use the language of the state

court in this case, "the defendant's dam sets back water upon the plaintiff's dam in such a way as very greatly to diminish the water power there." (Opinion of the Supreme Judicial Court, Record, p. 112.)

An owner is deprived of his property when he is deprived of the right to use and enjoy it.

Edwards v. Preston 184 Mass. 529.

~~Aetna Mills v. Waltham, 126 Mass. 422.~~

Howe v. *Weymouth*, 148 Mass. 605.

~~*Mills v. Randolph*, 157 Mass. 345.~~

In re Wall St., 17 Barb. 617.

Portland v. *Lee Sam*, 7 Oregon, 397.

Driver v. *Western Union R.R. Co.*, 32 Wis. 569.

Forster v. *Scott*, 136 N.Y. 577.

Whyte v. *Kansas*, 22 Mo. App. 409.

Isele v. *Schwamb*, 131 Mass. 337.

~~*Edwards v. Preston*, 184 Mass. 529.~~

A right taken is to be paid for without regard to time when or the extent to which the taker may see fit to exercise it.

Newton v. *Perry*, 163 Mass. 319.

Imbescheid v. *Old Colony R.R. Co.*, 171 Mass. 209.

The Massachusetts rule that "the right to erect and maintain a dam to raise water for working a mill does not give to the mill owner any right in the land flowed or take away any right from the land owner," because "the latter may embank his land and thus stop any flowage of it, or if he chooses he may collect of the mill owner damages in gross or annually for the flowage" (*Turner* v. *Nye*, 154 Mass. 579, 583; *Lowell* v. *Boston*, 111 Mass. 454, 466;

Williams v. *Nelson*, 23 Pick. 141, 143), is opposed to the decisions of this court, violates the 14th Amendment, and is generally condemned.

Lewis, Eminent Domain, secs. 182, 183.

It overlooks the fact that the embankment by the land owner to prevent the flooding by the mill owner produces, at the former's expense, the identical results to be avoided; and eminent judges of the Supreme Court of Massachusetts have refused to assent to it.

Kenison v. *Arlington*, 144 Mass. 456, 457.
Turner v. *Nye*, 154 Mass. 579, 585, 586.
Isele v. *Bank*, 135 Mass. 142, 144.

V.

The Mill Act (Mass. Pub. Sts. c. 190), printed on page 153 of this brief, authorizes depriving a person of property without due process of law within the meaning of the 14th Amendment, because, as interpreted by the state court, it authorizes the taking of the property of another without notice to the owner thereof, by acts of occupation, like the making of the excavation in the present case, so unintelligible and ambiguous as to utterly fail to indicate how much of the property of the owner was or is to be taken, or even that any of his property is to be injuriously affected.

The Mill Act, Pub. Sts. c. 190, secs. 1, 2, is as follows: —

"Section 1. Any person may erect and maintain a water-mill, and a dam to raise water for working it, upon and across any stream not navigable, upon

the terms and conditions and subject to the regulations hereinafter expressed.

"Sect. 2. No such dam shall be erected to the injury of a mill lawfully existing, either above or below it, on the same stream, nor to the injury of a mill-site on the same stream on which a mill or mill-dam has been lawfully erected and used, unless the right to maintain a mill on such last-mentioned site has been lost or defeated by abandonment or otherwise; nor shall a mill-dam be hereafter erected or raised to the injury of any such mill-site which has been occupied as such by the owner thereof, if such owner within a reasonable time after commencing such occupation completes and puts in operation a mill for the working of which the water of such stream is applied; nor shall a mill or dam be placed on the land of any person without such grant, conveyance, or authority from the owner as would be necessary by the common law if no provision relating to mills had been made by statute."

The decision of the state court in the case at bar bears out the interpretation of the Mill Act above stated in proposition V.

The master found and ruled (Master's Report, Record, p. 80) in accordance with the defendant's first request, —

"1. Upon the facts found and agreed and the law in the case, the appropriation by the Ludlow Manufacturing Company of the power comprehended by its present development at Red Bridge was prior to any appropriation by the Otis Company at its so-called lower privilege." (Master's Report, Record, p. 76.)

This appropriation comprehended the natural fall of 12.88 feet on the plaintiff's land (Master's Report, Record, p. 35), and the right to use the surface of the plaintiff's land for storing water, and excluded the plaintiff from the use of the slope of his land, and from the use of the land flowed, and deprived him of the beneficial enjoyment of his property.

The taking of the right to use the plaintiff's land and a natural fall of the stream thereon was accomplished by the defendant making the following occupation of its own land, viz., On the 3d day of August, 1899, the defendant dug a hole on its land two miles below the plaintiff's as a part of the tail race of an intended dam. (Master's Report, Record, pp. 38, 75.)

This occupation on the 4th day of April, 1900, the day when the plaintiff determined on building its dam (Master's Report, Record, p. 40), had progressed only to the extent of an excavation 8 to 10 feet deep, 25 to 30 feet long, and 12 to 15 feet wide, and the stripping of some of the soil, which was not commenced until March 30, 1900. This occupation did not indicate the height of the dam nor the height to which it was intended to flow (Master's Report, Record, p. 64), and was accompanied by an inquiry of the plaintiff by the defendant as to the location of the plaintiff's boundary line, as if the defendant intended to observe it (Master's Report, Record, p. 61), and by the intentional concealment by the defendant from the plaintiff of its intention to flow the plaintiff's property. (Master's Report, Record, pp. 63, 64.)

As late as August 5, 1900, there was no construction of the defendant's dam above the surface of the soil, and not until September 8, 1900, did the defendant begin the laying of the stonework. (Master's Report, Record, p. 66.)

It was not until April 11, 1901, that the plaintiff, by means of a direct inquiry, learned the defendant's dam, when completed, would flow the plaintiff. (Master's Report, Record, p. 63.)

The state court, in its opinion in the case at bar, says, —

> "The rule prescribed by the statute calls for an actual appropriation of the site to use for the development of water power, followed by a completion of the work and the actual use of the water within a reasonable time." (Opinion of the Supreme Judicial Court, Record, pp. 112, 114.)

It follows, therefore, that a riparian proprietor, by an act of occupation of his mill-site in a manner which does not indicate to the owners of land above, whether riparian or otherwise, how far back he will flow, or even that he will flow at all, thereby deprives the owners of land for miles above of their right to the beneficial use and enjoyment of their own property.

It is incredible that such an act, accompanied, as in the present case, by concealment (Master's Report, Record, pp. 62, 63), bad faith, and false entries in books (Master's Report, Record, pp. 47, 60) is due process of law.

It is fundamental law that until private property has been taken the owner is entitled to the use and enjoyment thereof, and that the act of taking is invalid if not clear and intelligible. An act which does not indicate that a right is taken is not a taking.

The taking may be actual, as where the dominion exercised over the property, or the use made of it, shows that the owner is excluded from the enjoyment thereof.

A flowing of land by authority of statute is such a taking.

Pumpelly v. *Green Bay & M. Canal Co.*, 13 Wall. 166.
Head v. *Amoskeag Co.*, 113 U.S. 9.
United States v. *Lynah*, 188 U.S. 445.
Roxbury Mill Corp. v. *Newman*, 12 Pick. 467, 478, 482.
Eaton v. *B.C. & M. R.R.*, 51 N.H. 504.
Manigault v. *Springs* (decided by this court December 4, 1905).

Flowing under this Mill Act (until the decision in the case at bar) was the act of appropriation in accordance with the rule laid down in *Storm* v. *Manchaug*, 13 Allen, 10, 15, in these words:

> "There is nothing in the statute now in force which vests any rights of flowing in the mill owner before he has actually exercised them; or which gives the land owner compensation for any restriction upon the use of his land until the flowing takes place. A statute authority in derogation of common law rights is not to be extended by construction."

The occupation of the surface of land by a mill pond is as clear and intelligible as a plan or written description.

In the *National Fibre Board Co.* v. *Lewiston & Auburn Electric Co.*, 95 Me. 318, 322, the court say, —

> "In other words a mill owner can at any time appropriate for raising and maintaining a head of water for working his mill, so much space in the river valley as has not already been appropriated by

> some other mill owner for his own mill. *This appropriation, however, must be actual to become a right.* It cannot be by mere proclamation nor even by marking limits. There must be an actual occupation of the space by a head or pond of water raised by dams actually constructed of the requisite height and efficiency to raise such a head."

It cannot be seriously claimed that digging a hole by an owner on its land is an actual appropriation of land of another two miles distant, or that the acts of the defendant on its land in August, 1899, which were not sufficient to raise the waters of the stream before October 16, 1901, were an actual prior appropriation of the fall of the stream on the plaintiff's land, which fall had been actually applied by the plaintiff to the working of its mills on the 1st day of July, 1901.

If this use by the defendant of its mill-site was a taking of the plaintiff's rights, it was so constructively by operation of law, just as a filing of a certificate of taking may operate as a taking under the authority of a statute.

The rule governing such takings is thus stated by the Supreme Judicial Court of Massachusetts in a case in which a taking by certificate was held void:

> "The appropriation of private property to the public use, which is one of the highest acts of sovereign power, should not be accomplished by the use of ambiguous or uncertain language. The presumption is in favor of the owner of the land, and any act done by public authority which interferes with his rights should be . . . clear and intelligible."
>
> *Glover* v. *Boston*, 14 Gray, 282, 288.

This rule applies to takings by written declarations which for convenience may be termed constructive takings.

Glover v. *Boston*, 14 Gray, 282.
Wilson v. *Lynn*, 119 Mass. 174.
Wamesit Power Co. v. *Allen*, 120 Mass. 352.
Kenison v. *Arlington*, 144 Mass. 456.
Woodbury v. *Marblehead Water Co.*, 145 Mass. 509.
Hollingsworth &c. Co. v. *Foxborough*, 165 Mass. 186.

In *Hamor* v. *Bar Harbor Water Co.*, 78 Me. 127, 130, it was held that riparian rights could not be constitutionally taken by an ambiguous act of diversion, and that a taking in such a case must be defined by writing. We refer to the language of the court for the statement of the case:

"The defendant corporation, by special act of the legislature approved February 10, 1874, c. 449, was authorized to take, detain and use the water of Eagle Lake, and Duck Brook, or either of them, for the purpose of conveying to, and supplying the village and vicinity of Bar Harbor with pure water; and to erect and maintain dams and reservoirs, and lay and maintain pipes and aqueducts necessary for the proper accumulating, conducting, discharging, distributing and disposing of water, and forming proper reservoirs thereof. By this act the corporation is held liable to pay all damages that may be sustained by any persons by the taking of any land, or other property, or by flowage, or by excavating through any land for the purpose of laying down pipes and aqueducts, building dams and reservoirs, and also damages for any other injuries resulting from said acts.

"It is also provided that in case damage is sustained and the amount to be paid cannot be mutually agreed upon, then the party suffering such damage may cause the same to be ascertained in the same manner and under the same conditions, restrictions and limitations as are provided in the case of damages by the laying out of highways.

"By section 6, 'said corporation shall cause surveys to be made for the purpose of locating their dams, reservoirs and pipes and other fixtures, and cause accurate plans of such location to be filed in the office of the town clerk of said Eden, and notice of such location shall be given to all persons affected thereby by the publication in some public newspaper in said county; and no entry shall be made upon any lands, except to make surveys, until the expiration of ten days from the said filing and publication.'

"The plaintiffs were the occupants of a saw mill upon Duck Brook, and this action on the case is brought by them to recover damages for the diversion of the water from said stream from March first, 1876, to March first, 1882.

. . . . . .

"It is thus that the right of property of private individuals, whether it be lands, or the usufructuary interest in flowing water, is made to subserve the public exigencies, and for which, under the constitution, 'just compensation' is guaranteed, and must be made. 'It is true the injury in the one case is to the land, and in the other to the water; but this can make no difference in the result. Interests in water, as well as in land, may be taken under this act; and both are equally the subjects of compensation.' *Denslow* v.

New Haven & Northampton Co., 16 Conn. 103; *St. Helena Water Co.* v. *Forbes*, 62 Cal. 182; (s.c.) 45 Am. Rep. 659.

"Neither can water be diverted from a private stream under authority granted by the legislature in the exercise of the right of eminent domain for the purpose of supplying a town or village with pure water without making compensation to the riparian proprietors whose rights are thereby injuriously affected. *Bailey* v. *Woburn*, 126 Mass. 416: *Lund* v. *New Bedford*, 121 Mass. 286; *Wamesit Power Co.* v. *Allen*, 120 Mass. 354. Nor can individual property be taken, or individual rights impaired, for the benefit of the public without such compensation. *Canal Commissioners* v. *People*, 5 Wend. 456.

. . . . . .

"The statute authorized the taking, detaining and using of water in which the plaintiffs had valuable rights. That the defendants have taken the water is admitted. Yet it nowhere appears that the taking has ever been evidenced by any writing of any kind whereby the measure of such taking has been, or can ever be, made known to the plaintiffs or anyone else. There has been a taking of the plaintiffs' property, resulting in damages to them, but there has been no preliminary act evidenced by any writing specifying and defining what or how much has been taken, or is to be taken, which is necessary for the just protection and proper security of the owner of property taken.

. . . . . .

"There is no reason why the same requirements should not apply equally to the taking of water from a stream in which the plaintiffs have valuable riparian

rights, as to the taking of land. Both are equally the subjects of property and of compensation. *Ex parte Jennings*, 6 Cow. 526. By the statutes of this state the word land includes all tenements and hereditaments connected therein and all interests therein. The riparian proprietor may insist that his right to the use of water flowing in a natural stream shall be regarded and protected as property, *Nuttall* v. *Bracewell*, L.R. 2 Exch. 9. Such right is not a mere easement or appurtenance but is inseparably annexed to the soil itself. *Dickinson* v. *Grand Junction Canal Co.*, 7 Exch. 299; *Cary* v. *Daniels*, 8 Met. 480. And the damage for the taking of such right may be greater or less according to the quantity of water diverted as the damage may be greater or less when measured by the quantity of land taken. If it be necessary, therefore, that the taking of land thus appropriated to public use be evidenced by some writing defining it by definite and specific boundaries, for the same reason should there be like evidence of the measure or quantity of water thus taken. Without this, no proper estimate of damages could be made. *Without this, no proper protection would be afforded to the parties without resorting to the 'uncertainties of conflicting testimony.'*

. . . . . .

"Not only, therefore, is the evidence, so far as the plaintiffs' rights are concerned, too uncertain, but the use of the grant too fluctuating, to afford a legal justification to the defendants; and the conclusion of the court is that this action may be maintained."

Warren v. *Spencer Water Co.*, 143 Mass. 9, is to the

same effect as *Hamor* v. *Bar Harbor Water Co.*, 78 Me. 127, and is so interpreted in *Gloucester Water Supply Co.* v. *Gloucester*, 179 Mass. 365.

In *Gloucester Water Supply Co.* v. *Gloucester*, *ubi supra*, the state court, at page 374, say, —

> "Whether the actual diversion of water is a legal taking of, it is a question in which the cases in this Commonwealth are not in entire harmony," —

and in their opinion refer to *Warren* v. *Spencer Co.*, *ubi supra*, and *Hamor* v. *Bar Harbor Water Co.*, *ubi supra*, as decisions against its legality, and to *Brickett* v. *Haverhill Aqueduct Co.*, 142 Mass. 394, as supporting it.

The other cases referred to in the opinion in *Gloucester Water Supply Co.* v. *Gloucester*, *ubi supra* (of which *Moore* v. *Boston*, 8 Cush. 274, is a type), are cases in which the diversion of water was held to fix the date limiting the time in which petitions for compensation must be brought, but in which the takings were evidenced by definite descriptions of the property taken filed under the statutes.

Brickett v. *Haverhill Aqueduct Company* was a case of a definite actual appropriation. By reference to the record in that case it will appear that Kenoza lake was a great pond, the waters of which belonged to the state. The lake bordered on a highway and flowed out, through a culvert under the highway as a stream called Fishing river, through the plaintiff's land on the other side of the highway. Fishing river was three feet wide. The statute authorized the company to take the waters of the lake between high- and low-water mark. The company built a dam between the highway and the pond 4 to 5 feet long

and 28 inches high, being 20½ inches above high-water mark.

It was not claimed in *Brickett* v. *The Haverhill Aqueduct Co.* that the taking was ambiguous. The question argued and decided was whether the statute made adequate provisions for damages. The court held that the action, which was tort for diversion of a watercourse, could be maintained only for damages caused by land or water when the plaintiff would have had it if the dam had not been above high-water mark. The case finally resulted in a judgment of one dollar for the plaintiff.

Indefinite or ambiguous acts or conduct cannot constitute a taking, either actual or constructive, because from the very nature of things, if the subject matter is not physically appropriated there is no actual taking, and if the subject matter is not described or pointed out there is no constructive taking.

These considerations are of vital importance, because the owner's right to compensation is fixed and measured the very instant he is deprived of his right to use his property. Until his right to use his property is taken he has the right to improve it, and he has the right to recover the value of improvements existing when the taking occurs; but he cannot recover for improvements made subsequent to the taking.

If an indefinite, ambiguous act be held a valid taking, it would follow that a riparian owner, by the mere act of sinking a spade into the soil, takes a right to flow lands of owners miles above his property without their knowledge that their rights have been at all affected; and if the owners erect improvements on the land after the taking, they cannot recover the value of the improvements.

In order to meet the objection that an act of occupation like the excavation in the present case is too ambiguous to constitute a valid taking of land and property rights two miles distant, the defendant may claim that the taking of the property rights of the landowner is not complete until the latter's land is actually flowed, and may refer, in support of its contention, to the language of the state court in the case at bar; viz.,—

> "The rule prescribed by the statute calls for an actual appropriation of the site to use for the development of water power, followed by a completion of the work and the actual use of the water within a reasonable time." (Opinion of the Supreme Judicial Court, Record, p. 114.)

This claim cannot be supported.

Before August 3, 1899, the day the defendant began its occupation of the Red Bridge mill-site, the plaintiff and defendant were on an equal footing as to their rights to use and develop their respective land and water powers. At common law each had a right to improve and use its land and the water power within the limits thereof. Under the decision of the state court in the case at bar, immediately upon and in consequence of its act of occupation of its land, the defendant acquired under the Mill Act a right to use the plaintiff's land and water power, defeasible only by the abandonment of, or by unreasonable delay in the completion of, the work begun; and whether the defendant pursued to completion the work so begun was a matter subject to its own will, and one in which the plaintiff had no voice. Whatever rights, absolute or conditional, the defendant acquired by such act of appropriation to deal thereafter with the plaintiff's land and water power, the

plaintiff from that moment was restricted in its right to the use and enjoyment of its land and water power.

It is true that the defendant would have lost the right to use the land if it had failed to proceed diligently with the development, but it had the right to so proceed if it saw fit, and no act of the plaintiff, after the commencement of occupation by the defendant, could have restored the plaintiff's rights. The test of taking is whether the land owner has been deprived of a right which he cannot regain, and not whether the mill owner may, at his own volition, lose a right which he has acquired.

It therefore follows in the case at bar that if the plaintiff's rights were taken by the flowing, and not before, the plaintiff is entitled under the Mill Act to recover the value of land and improvements in its then condition. If such be the interpretation of the Mill Act it authorizes, as in the case at bar, one mill owner to take and use for working its mill the land and water power of another mill owner devoted by the latter to operating a similar mill for substantially similar purposes.

The public in such case is not even indirectly benefited and the nature of the use of the power is changed in no legal respect.

The court can deal with this particular phase of the constitutional question unembarrassed by any apprehension that injurious results will follow from reversing the decision of the state court.

The decision by the state court that the digging a hole on a mill-site by its owner is a taking of land and water rights of another two miles above is an innovation, and is opposed to an uninterrupted line of cases in that state and in other states having somewhat similar statutes, holding

that no rights to flow vest in the mill owner before his property is actually flowed.

The clause in section 2 of the Mill Act, under which the state court in the case at bar held that digging a hole on the defendant's mill-site was a taking of the land and water rights of the plaintiff two miles above, is as follows: —

> "Nor shall a mill dam be hereafter erected or raised to the injury of any such mill site which has been occupied by the owner thereof, if such owner, within a reasonable time after commencing such occupation, completes and puts in operation a mill, for the working of which the water of such stream is applied." (Opinion of the Supreme Judical Court, Record, pp. 113, 114.)

We briefly refer to the Mill Act and the origin of the clause in question:

Pub. Sts. c. 190, sec. 1, authorizes a riparian proprietor to do that which it was unlawful for him to do at common law, namely, to erect a dam for mill purposes which will flow the land of another, and is as follows: —

> "Section 1. Any person may erect and maintain a water-mill, and a dam to raise water for working it, upon and across any stream not navigable, upon the terms and conditions and subject to the regulations hereinafter expressed."

Pub. Sts. c. 190, sec. 2, provides that such a dam shall not be erected in certain cases, and is as follows: —

> "Section 2. No such dam shall be erected to the injury of a mill lawfully existing, either above or

below it, on the same stream, nor to the injury of a mill site on the same stream on which a mill or mill-dam has been lawfully erected and used, unless the right to maintain a mill on such last mentioned site has been lost or defeated by abandonment or otherwise: nor shall a mill-dam be hereafter erected or raised to the injury of any such mill site which has been occupied as such by the owner thereof, if such owner within a reasonable time after commencing such occupation completes and puts in operation a mill for the working of which the water of such stream is applied; nor shall a mill or dam be placed on the land of any person without such grant, conveyance, or authority from the owner as would be necessary by the common law if no provision relating to mills had been made by statute."

The origin of the clause in question is of importance.

The Provincial Laws, 1713–1714, c. 9 (Anne, 12, 13), so far as material to this point, were as follows: —

"Whereas it hath been found by experience, that when some persons in this province have been at great cost and expenses for building of mills serviceable for public good and benefit of the town, or considerable neighborhood, in or near to which they have been erected; that in raising a suitable head of water for that service, it hath sometimes so happened that some small quantity of lands or meadows have been thereby flowed and damnified, not belonging to the owner or owners of such mill or mills, whereby several controversies, and law suits have arisen;

"For prevention whereof for the future:

"Be it therefore enacted by his Excellency, the

Governor, Council and Representatives in General Court assembled, and by authority of the same, That where any person or persons have already, or shall hereafter, set up any water mill or mills, upon his or their own lands, or with the consent of the proprietors of such lands legally obtained, whereupon such mill or mills is or shall be erected or built; that then such owner or owners shall have free liberty to continue and improve such pond for their best advantage without molestation.

"And if any person or persons find themselves aggrieved and damnified in their propriety of lands by its being flowed by the owner or occupant of such mills stopping or raising the water; that in every such case, the party so damnified in his propriety, upon application for relief to the Court of General Sessions of the Peace in the county where such mills or pond is, the said Court be and hereby are empowered to issue out a warrant, directed to the sheriff of the same county, to summon and empanel a jury of good and lawful men, at the proper cost and charge of the owner or owners of such mill or mills; and the jury shall be sworn by a justice of the peace, to a faithful, indifferent appraisal of the yearly damage done to the person complainant, by flowing his or their land as aforesaid." . . .

Statute of Massachusetts, acts 1795, c. 74, was a substantial re-enactment of the same act, and, so far as material, was as follows: —

"Whereas the erection and support of mills, to accommodate the inhabitants of the several parts of the State, ought not to be discouraged by many doubts

and disputes, and some special provisions are found necessary relative to flowing adjacent lands and mills held by several proprietors: Therefore,

"Sect. 1. *Be it enacted by the Senate and House of Representatives, in General Court assembled, and by authority of the same*, That where any person hath already erected or shall erect any water-mill on his own land or on the land of any other person, by his consent legally obtained, and to the working of such mill it shall be found necessary to raise a suitable head of water, and in so doing any lands shall be flowed not belonging to the owner of such mill, it shall be lawful for the owner or occupant of such mill to continue the same head of water to his best advantage, in the manner, and on the terms hereinafter mentioned.

"Sect. 2. *And be it further enacted*, That if any person shall sustain damages in his lands by their being flowed as aforesaid, he may complain to the Court of Common Pleas of the county wherein the land so flowed shall be situated, and the said court shall issue a warrant to the sheriff of the same county; and if the sheriff shall be interested, then to some coroner of the same county not interested, such sheriff or coroner to be named by the court, directing him to summon and empanel a jury of twelve good and lawful men; which jury shall be sworn to make a true and faithful appraisement of the yearly damages done to the complainant by so flowing his lands, and how far the same may be necessary. And said jury shall try the cause; and their verdict being returned by the officer to the same court, and there allowed and recorded, shall be a

sufficient bar to any action to be brought for any such damages. And it shall be in the power of said Court to assess such sum to the officer, for his services, as they may judge reasonable."

This act in terms authorized flowing the land of another and compensation to the owner for damages done "by so flowing his lands."

The court, however, applying the principle that cases within the letter, but not within the spirit, of the statute are not governed by it, held that the statute did not authorize flowing existing mills, or mills in process of construction.

Hatch v. *Dwight*, 17 Mass. 289.
Bigelow v. *Newell*, 10 Pick. 348, 357

The act of 1824, c. 152, first made the owner of a statutory dam liable under the statute for flowing land below.

Wolcott &c. Co. v. *Upham*, 5 Pick. 292, 294.
Fiske v. *Framingham Mfg. Co.*, 12 Pick. 67.
Shaw v. *Wells*, 5 Cush. 537.
Gile v. *Stevens*, 13 Gray, 146.

There were no changes in the statutes material to the consideration of the questions raised until the revision of 1836, which is as follows: —

Rev. Sts. c. 116:

"Section 1. Any person may erect and maintain a water mill, and a dam to raise water for working it, upon and across any stream, that is not navigable, upon the terms and conditions, and subject to the regulations, hereinafter expressed.

"Sect. 2. No such dam shall be erected, to the

injury of any mill lawfully existing either above or below it, on the same stream, nor to the injury of any mill site on the same stream, on which a mill or mill dam shall have been lawfully erected and used, unless the right to maintain a mill, on such last mentioned site, shall have been lost or defeated, by abandonment or otherwise; nor shall any mill or dam be placed on the land of any person, without such grant, conveyance or authority from the owner, as would be necessary by the common law, if no provision relating to mills had been made by statute.

. . . . . .

"Sect. 4. Any person, whose land is overflowed, or otherwise injured by such dam, may obtain compensation therefor, upon his complaint before the court of common pleas for the county where the land or any part thereof lies, provided, that no compensation shall be awarded for any damage, sustained more than three years before the institution of the complaint."

It is apparent that section 1 of chapter 116 of Revised Statutes is the same in legal effect as section 1 of St. 1795, and authorizes flowage, although, unlike the earlier act, without using the word "flow," and that section 4 of chapter 116, of Revised Statutes, like section 2 of St. 1795, gives a person injured by flowage a remedy for the damages thereby sustained. Indeed, not only was it true that only damages caused by flowing could be recovered, —

Palmer Co. v. *Ferrill*, 17 Pick. 58, 66;
McNally v. *Smith*, 12 Allen, 455;
Eames v. *New England Worsted Co.*, 11 Met. 570, —

but also that under the Mill Act such damages could not be recovered for injury to personal property.

Gile v. *Stevens*, 13 Gray, 146.

Rev. Sts. c. 116, sec. 2, in enumerating the cases in which flowage was prohibited, retained the prohibition declared by the court against flowing an existing mill, but not the one against flowing a mill-site on which a mill was in process of construction. In other words, the rule laid down in *Bigelow* v. *Newell*, *ubi supra*, with respect to mill-sites was abrogated by this section.

The court, in *Baird* v. *Wells*, 22 Pick. 312, construed the identical clause now under consideration, viz., "No such dam shall be erected to the injury of any mill lawfully existing," etc.

In that case the plaintiff began the construction of his dam and mill in December, 1836, the defendant in March, 1837. The defendant finished his dam in April, 1837, and by flowing prevented further construction by the plaintiff. The court there said, —

> "The question is, whether the present case is brought within this prohibitory clause of the statute. And it is the opinion of the Court that it is not. At the time the defendants' dam was erected the plaintiff had no existing mill. The defendants' dam was erected in April, 1837; and the plaintiff's mill was not completed until the December after. . . . Nor was the plaintiff's mill site one on which a mill or mill dam had ever before been erected and used."

The Mill Acts, then, up to the enactment of the Revised Statutes allowed a riparian proprietor to flow for mill

purposes the land of others in all cases excepting where such land was occupied by a completed mill or one in process of construction.

The Revised Statutes, as interpreted by the court in *Baird* v. *Wells*, *ubi supra*, extended the right of flowage to land on which a mill was in process of construction, and the decision of the court in that case was immediately followed by an enactment for the purpose of restoring the prohibition against flowing the land of another owner who had first begun to construct his dam.

Baird v. *Wells* was decided in 1840, and in consequence of the decision chapter 18 of the acts of 1841 was enacted to protect mill-sites from flowage:

> "Sect. 1. No mill-dam shall hereafter be erected or raised to the injury of any mill-site upon the same stream, which shall have been occupied as such by the owner thereof, provided such owner shall, within a reasonable time after commencing such occupation, complete and put in operation a mill, for the working of which the water of such stream shall be applied."

These provisions of the Revised Statutes as modified by the act of 1841, were re-enacted by General Statutes, c. 149, secs. 1, 2, and again by Public Statutes, c. 190, secs. 1, 2:

> "Sect. 1. Any person may erect and maintain a water-mill, and a dam to raise water for working it, upon and across any stream not navigable, upon the terms and conditions and subject to the regulations hereinafter expressed.
>
> "Sect. 2. No such dam shall be erected to the injury of a mill lawfully existing, either above or

below it, on the same stream, nor to the injury of a mill-site on the same stream on which a mill or mill-dam has been lawfully erected and used, unless the right to maintain a mill on such last-mentioned site has been lost or defeated by abandonment or otherwise; nor shall a mill-dam be hereafter erected or raised to the injury of any such mill-site which has been occupied as such by the owner thereof, if such owner within a reasonable time after commencing such occupation completes and puts in operation a mill for the working of which the water of such stream is applied; nor shall a mill or dam be placed on the land of any person without such grant, conveyance, or authority from the owner as would be necessary by the common law if no provision relating to mills had been made by statute."

The prohibition against injury in section 2 is manifestly confined to injury to land of another by actually flowing.

In *Storm* v. *Manchaug Co.*, 13 Allen, 10, the question was, —

"Whether, if the plaintiff has begun to raise the dam connected with his mill, intending to raise it to a height which, when completed, would flow the land of the defendants, they have the right, by digging a canal on their own land before it is flowed, to prevent the flowing beyond the height to which the water was previously raised."

The court decided in favor of the defendants, saying, at page 15, —

"For we can see no reason to doubt that the owner

of land adjoining a stream, until his land is flowed by a mill-dam, has all the rights to use it which other land-owners enjoy. His land may be well suited for the creation of a mill-pond, but he is under no obligation to keep it in that condition for the benefit of his neighbor. His common law right is not to be taken from him or limited, unless by a clear provision of the statute.

. . . . . .

"There is nothing in the statute now in force which vests any rights of flowing in the mill-owner before he has actually exercised them; or which gives the land-owner compensation for any restriction upon the use of his land until the flowing takes place. A statute authority, in derogation of common law rights of property is not to be extended by construction."

Storm v. *Manchaug*, 13 Allen, 10, 15.

Whether it be said that the mill owner by the act of flowing, acquires an easement, —

Boston & Roxbury Mill Corporation v. *Newman*, 12 Pick. 467;
Talbot v. *Hudson*, 16 Gray, 417;
Isele v. *Schwamb*, 131 Mass. 337, 340;
Isele v. *Bank*, 135 Mass. 142;
Kenison v. *Arlington*, 144 Mass. 456;
FIELD, C.J., in *Turner* v. *Nye*, 154 Mass. 579, 585, 586, —

or that the mill owner at no time acquires any right, title, or interest in the land, —

Lowell v. *Boston*, 111 Mass. 454, 466;
Turner v. *Nye*, 154 Mass. 579, 583;

Williams v. *Nelson*, 23 Pick. 141, 143;
Murdock v. *Stickney*, 8 Cush. 113, 116, —

is immaterial so far as practical results are concerned. In all the cases until the decision of the case at bar, it is conceded that no rights are lost by the owner of the land, and none are gained by the owner of the dam, before flowage takes place.

The state court, in its opinion in the case at bar, said that the statute of 1841 restored the rule which existed prior to the enactment of the Revised Statutes. It does; but the rule was that a dam should not be erected to injure by flowage land on which there was a mill erected or land of another owner who had first commenced to occupy it for mill purposes.

No Massachusetts case was cited by the court which decides or says that under any Mill Act of this state (excepting Rev. Sts. c. 116, sec. 2, modified as soon as interpreted), one proprietor can, by first beginning to occupy his mill-site, flow out a completed mill, and no Massachusetts case was cited to the effect that the word "injury" in this act means anything more than injury by flowage, and no such decisions exist.

The state court admit that a strict construction of the Mill Act would lead to an opposite decision from that of the court in the case at bar, and give the Mill Act a most liberal construction.

But from the earliest cases in Massachusetts, including *Hatch* v. *Dwight*, 17 Mass. 289, the court has looked at the Mill Act as inconsistent with present conditions, and has uniformly declared, as in *Storm* v. *Manchaug*, 13

Allen, 10, and *Murdock* v. *Stickney*, 8 Cush. 113, that, being in derogation of common law rights, it should be construed strictly.

The Supreme Judicial Court, in the case at bar, in support of its interpretation of the statutes cites the case of, —

Storm v. *Manchaug Co.*, 13 Allen, 10–15, —

but in *Storm* v. *Manchaug Co.*, the court say, —

> "we can see no reason to doubt that the owner of land adjoining a stream, until his land is flowed by a mill-dam, has all the rights to use it which the other land owners enjoy. His land may be well suited for the creation of a mill-pond, but he is under no obligation to keep it in that condition for the benefit of his neighbor. His common law right is not to be taken from him or limited, unless by a clear provision of the statute," —

and refer to the rule that existed before the Revised Statutes in these words.

> "Before the revised statutes, if an upper proprietor was building a mill, he was held to so far have appropriated the water privilege that the lower proprietor could not erect a new dam, or raise an old one, to his injury." (Citing *Bigelow* v. *Newell*, 10 Pick. 348.)

There is nothing in this language to indicate that a lower proprietor could, by first commencing the construction of a dam, flow out a mill or dam above, which was completed first. The court in *Storm* v. *Manchaug Co.* then proceed to accurately state the law under the Revised Statutes:

"By a slight and perhaps unintentional change of the phraseology introduced into these statutes, it was held that the law was changed; and that nothing but an existing mill could prevent the lower proprietor from putting a mill-dam upon his own land, although the effect of it might be to destroy an upper privilege which its owner had previously begun to occupy. (*Baird* v. *Wells*, 22 Pick. 312.) This was altered and the old rule restored by St. 1841, c. 18. There is nothing in the Statute now in force which vests any rights of flowing in the mill owner before he has actually exercised them; or which gives the land owner compensation for any restriction upon the use of his land until the flowing takes place. A statute authority, in derogation of common law rights of property, is not to be extended by construction."

The decision and language of the case of *Storm* v. *Manchaug Company* is entirely inconsistent with the decision in the state court in the present case.

After having cited *Storm* v. *Manchaug* as above the state court, in its opinion in the case at bar, proceeds as follows: —

"That this is the true construction of the Statutes is further indicated by the language used in other cases. *Dean* v. *Colt*, 99 Mass. 486, 487. *Fitch* v. *Stevens*, 4 Met. 426–428." (Opinion of the Supreme Judicial Court, Record, p. 115.)

In *Fitch* v. *Stevens*, *ubi supra*, the court decided only that a dam was not authorized by the Mill Act unless a mill was built in connection with it. The language of the opinion was as follows: —

"And it was decided in this Court in the case of *Stowell* v. *Flagg*, 11 Mass. 364, after a careful and able examination of these statutes, that no action since the St. 1795, c. 74, would lie at common law against a mill owner for flowing the land of another.

"While we accord entirely with the reasoning and decision of that case, we think the position is to be received with some qualification; and we are of opinion, that, upon a true construction of the spirit and intent of the statutes, no person can avail himself of the privileges conferred by them, nor bring himself within their protection, merely by erecting a dam across a stream running through his land. There must be coupled with such erection the building of a mill for use or there must exist the intent, which shall be capable of proof, forthwith to erect one."

In *Dean* v. *Colt*, *ubi supra*, the plaintiff brought an action of tort against the defendant for flowing back and destroying the plaintiff's wheels and machinery. The plaintiff had lowered his wheel pit, so that by lowering the wheel he might use the unappropriated water power, but did not lower or intend to lower the wheel, continuing to use it as before. Five years later the defendant raised his dam and set the water back to such an extent that while it did not interfere with the plaintiff's wheel at that time, the plaintiff could not lower his wheel without being interfered with by back water. Later the plaintiff lowered his wheel and then the back water interfered with it. The court held that the defendant was not liable in that action, saying, —

"The time when Pollock raised his dam is not material provided it was done before the plaintiff appro-

priated the water power to his own use. Such an appropriation would not be made by merely lowering his wheel-pit, unless he did it as the commencement of an occupation of the power."

Dean v. *Colt*, *ubi supra*, decides merely that the condition at the time of flowing and not at the time of beginning to occupy the lower site is the time of taking.

The court in the case at bar then refers to Washburn on Easements (4th ed.), pp. 336, 337. On page 470 of that edition, not referred to by the court, the learned author has thus carefully stated the limitations of the right to flow a mill-site under the act of 1841 :

"But if one begins in good faith to erect a mill and goes on and completes it within a reasonable time, he is considered as having, by such beginning, appropriated and occupied so much of the water and power of the stream as may be necessary for his mill, so that no one can go on, before he has completed his works, and erect works *below his and gain precedence by so doing*."

The state court, in the case at bar, then completes its reference to Massachusetts cases in the following language : —

"For general discussion of law see, —

Fuller v. *Chicopee Mfg. Co.*, 16 Gray, 43 ;
Fiske v. *Framingham Mfg. Co.*, 12 Pick. 68 ;
Fitch v. *Stevens*, 4 Met. 426 ;
Cary v. *Daniels*, 8 Met. 466 ;
Gould v. *Boston Duck Co.*, 13 Gray, 442 ;

Smith v. *Agawam Canal Co.*, 2 Allen, 355, 356." (Opinion of the Supreme Judicial Court, Record, p. 115.)

In *Fiske* v. *Framingham Mfg. Co.*, *ubi supra*, the court held that an artificial stream is not within the operation of the Mill Act. If there is anything, either in the decision or language of that case, or of the cases of *Fuller* v. *Chicopee Mfg. Co.*, *ubi supra*, and *Fitch* v. *Stevens*, *ubi supra*, which supports the conclusion of the state court in the case at bar, that the beginning of occupation of land fixes the right to flow, we should be pleased to have the defendants in error point it out.

In *Smith* v. *Agawam Canal Co.*, *ubi supra*, the court, at page 357, thus stated the rule under the Mill Act:

> "From these provisions it is an inevitable implication, that, although the right is given indiscriminately to all riparian proprietors, he who erects and establishes his mill does, by his priority of occupation, acquire to that extent a title to the use of the water in the stream prior and superior to that of any other person, and has a right to maintain his dam against all proprietors of lands both above and below his own. *Cary* v. *Daniels*, 8 Met. 466."

It is difficult to see how such language can be distorted into a basis for the interpretation of the statute by the state court in the case at bar.

In *Gould* v. *Boston Duck Co.*, *ubi supra*, the court, in considering a point not involved in the case at bar, thus stated the right to flow under the Mill Act:

> "The necessary consequence is, that when one

proprietor, under the common right, ***has in fact appropriated the power***, the proprietor below is so far restricted in his right of appropriation, that he cannot erect a mill on his own land and flow back the water, to the destruction of the mill already erected by authority of law. This priority of first possession necessarily arises from the nature of appropriation; where two or more men have equal rights to appropriate, and where the *actual appropriation* by one necessarily excludes all others, the first in time is the first by right."

It will be difficult for the defendants in error to do what the state court has failed to do in its opinion, and show how the alleged appropriation of the defendant, by digging a hole on its land, is an actual appropriation of the plaintiff's land and fall two miles above.

In *Judd* v. *Wells*, 12 Met. 504, the court held that after a mill owner had created a mill pond on the land, another land owner had no right to divert or draw off the water.

In *Storm* v. *Manchaug Co.*, *ubi supra*, the court held that until the land was actually flooded the owner acquired no right to flow.

How these decisions can be reconciled with the decision of the state court in the case at bar, or what, if any, of the Massachusetts cases support its decision, that court has utterly failed to show.

The state court attempted to support its opinion in the case at bar by a reference to the decisions in other states under similar statutes, and referred to —

Mills v. *Troost*, 14 Minn. 365–369.

Kelly v. *Natoma Water Co.*, 6 Cal. 105.
Kimball v. *Gearhart*, 12 Cal. 27.
Irwin v. *Strait*, 18 Nev. 436.

The statutes of Minnesota are utterly unlike the Mill Act of Massachusetts. The provisions of the Minnesota statute require a petition on the part of the mill owner, stating both the location of the dam, the height to which it is to be raised, notices to be posted of the appointment of a commission to assess the damages, and the filing of the report of damages and the payment of the damages assessed.

In *Mills* v. *Troost*, *ubi supra*, it was decided that a riparian property owner, under such statute, could not flow out another proprietor who had first commenced the construction of his dam. The very general language in the opinion of the court is without weight on the question presented in the case at bar.

The remaining cases cited by the state court are of those courts whose decisions, by reason of dissimilarity of conditions, have not heretofore been considered as in point upon the construction and interpretation of the Massachusetts Mill Act.

It may be observed in this connection that under the Maine Mill Act, the provisions of which are nearly identical with those of the state of Massachusetts, and not referred to in the opinion in the case at bar, it was held in a very recent case that —

> "This appropriation, however, must be actual to become a right. It cannot be by mere proclamation, nor even by merely marking limits. There must be an actual occupation of the space by a head or pond

of water raised by dams actually constructed of the requisite height and efficiency to raise such head."

National Fibre Board Co. v. *Lewiston & Auburn Electric Light Co.*, 95 Me. 318–322.

We have discussed the interpretation of the Massachusetts Mill Act by the state court in the case at bar at length merely to point out the fact that such has not been considered the meaning of the statute either by the courts or people of this state, and that this court can consider the constitutionality of this fetish taking unembarrassed by the suggestion that other people may suffer by their decision as we are suffering from the one complained of.

We believe that there is no decision to the effect that a statute authorizing a taking by such a method is constitutional.

Except in Massachusetts it is generally required that the taking under a mill act or analogous statute must be certain and definite, either by actual flowing or by petition or statement setting forth the land to be taken or flowed, the height of the dam, or the water rights taken.

Ala. Code (Civil) of Alabama (revision of 1897) secs. 1727 *et seq.*

Ark. Sandels & Hill's, Digest of the (Ark.) Statutes (1894 ed.), c. 58, pp. 734 *et seq.*, secs. 2792, 2794, 2797, 2804, 2805, 2806, 2807.

Cal. Deering's Annotated Codes and Statutes of California, vol. 2 (Civil Code), div. II., pt. IV., title VIII., secs. 1410, 1415, 1416 pp. 263 *et seq.*
Deering's Annotated Codes and Statutes of California, vol. 3 (Civil Procedure), pt. III., title VII., secs. 1243, 1244, pp. 481 *et seq.*

Colo. Mills' Annotated Statutes of Colorado, vol. 1, pp. 1099 *et seq.*, sec. 1716.

Conn. General Statutes, Connecticut (revision of 1902), secs. 982 *et seq.*

Del. Delaware Revised Code (ed. of 1852 as amended 1893), c. LXI., sec. 4.

Fla. Revised Statutes of Florida (ed. 1892), secs. 1544 *et seq.*

Id. Idaho Codes, Civil Code, secs. 2615, 2616; Code of Civil Procedure, secs. 3841 *et seq.*, 3847.

Ill. Hurd's Revised Statutes of Illinois (ed. 1903), c. 92, par. 1, pp. 1244 *et seq.*

Ind. Horner's Annotated Statutes of Indiana (ed. 1901), secs. 883, 884.

Iowa Code of Iowa Annotated (1897), secs. 1921, 1922, *et seq.*

Kan. General Statutes of Kansas (Dassler's Compilation of 1899), c. 66, secs. 3928–3931.

Ky. Carroll's Statutes of Kentucky (1903 ed.), secs. 2712 *et seq.*, also secs. 835–839.

La. Constitution and Revised Laws of Louisiana (Soloman Wolff, 1904 ed.), vol. 1, p. 739, sec. 1497.

Md. Public General Laws of Maryland (1904 ed.), pp. 739 *et seq.*, secs. 104 *et seq.*

Mich. Compiled Laws of Michigan (1897 ed.), sec. 6243.

Minn. Statutes of Minnesota (compiled 1894), c. 31.

Miss. Thompson, Dillard & Campbell's Annotated Code of Mississippi (1892 ed.), c. 92, secs. 2893 *et seq.*

Mo. Revised Statutes of Missouri (1899 ed.), c. 131, secs. 8731 *et seq.*, pp. 2033 *et seq.*

Mont. Montana Codes Annotated (1895) ed.; Code of Civil Procedure, secs. 2211–2228.

Neb. Compiled Statutes of Nebraska (1905 ed.), c. 57.

Nev. Bailey & Hammond's General Statutes of Nevada (ed. 1885), secs. 362 *et seq.*

N.J. General Statutes of New Jersey (1895 ed.), vol. 2, pp. 2093, 2094.

N. Dak. Revised Codes of North Dakota (1895 ed.), c. 35, secs. 5962 *et seq.*

Ohio Bates' Annotated Ohio Statutes (4th ed.), vol. 2, secs. 6416, 6418.

Ore. Bellinger and Cotton's Codes and Statutes of Oregon (ed. 1902), vol. 2, secs. 3935, 3936, *et seq.*, pp. 1318, 1319.

Pa. Brightly's Purdon's Digest, Pennsylvania Statutes (12th ed.), vol. 2, p. 1366, par. 9.

S. Dak. Revised Statutes of South Dakota (official edition 1903), c. 39, p. 999, secs. 841 *et seq.*

Tenn. Shannon's Annotated Code of Tennessee (1896 ed.), secs. 1846, 3437–3443.

Tex. Revised Statutes of Texas (1895 ed.), p. 607, art. 3112.

Utah Revised Statutes of Utah (1898 ed.), c. 65, secs. 3588 *et seq.*

Vt. Vermont Statutes (1894 ed.), c. 159, secs. 3623 *et seq.*

Va. Virginia Code (1904 ed.), c. 61, secs. 1348, 1350, 1351.

Wash. Ballinger's Annotated Codes and Statutes of Washington, vol. 1. secs. 4134, 4135, 4143, 4144.

W. Va. Code West Virginia (4th ed. 1899), c. XLIV., pars. 29 *et seq.*

Wy. Revised Statutes of Wyoming (1899 ed.), sec. 3084.

The master rightly ruled that the plans filed by the defendant with the county commissioners were not notice to the plaintiff of the defendant's intention to build its dam. (Record, pp. 63, 76.)

The plans were filed with the county commissioners under Pub. Sts. c. 190, sec. 52, in a proceeding to secure safety of construction, to which the plaintiff was not a party and of which notice is not given.

VI.

This Mill Act also violates the 14th Amendment because it does not make adequate provision for just compensation to the owner thereof for property taken under the authority of said act.

Adequate provision for making just compensation to the owner of property taken is required by the due process of law clause of the 14th Amendment.

Chicago, B. & Q. R.R. Co. v. *Chicago*, 166 U.S. 226, 241

~~*L.I. Water Supply Co. v. Brooklyn*, 166 U.S. 685–689.~~

~~*Norwood v. Baker*, 172 U.S. 269.~~

Williams v. *Parker*, 188 U.S. 491.

Mt. Hope Cemetery Proprietors v. *Boston*, 158 Mass. 509–519.

If adequate provisions for payment of compensation be made, possession of property or enjoyment of right taken may be had before such payment.

Cherokee Nation v. *Southern Kansas R.R.*, 135 U.S. 641.

Backus v. *Ft. St. Union Depot Co.*, 169 U.S. 557.
Sweet v. *Rechel*, 159 U.S. 380.
Williams v. *Parker*, 188 U.S. 491.

"But the owner is entitled to reasonable, certain and adequate provisions for obtaining compensation before his occupancy is disturbed."

Cherokee Nation v. *So. Kansas R.R.*, 135 U.S. 641, 659.

In other words the "due process of law prescribed by the 14th Amendment requires compensation to be made or secured to the owner."

Norwood v. *Baker*, 172 U.S. 269, 277.

A provision that compensation shall be paid by an individual or business corporation, but affording merely a right of action to obtain it, does not satisfy the constitutional requirement.

Attorney General v. *Old Colony Ry.*, 160 Mass. 62, 90.
Ash v. *Cummings*, 50 N.H. 591.
Steinhart v. *Superior Court*, 137 Cal. 575.
Howe v. *Norman*, 13 R.I. 488.
Powers v. *Bears*, 12 Wis. 213, 221.
Lewis, Eminent Domain, secs. 457, 458.

A provision that compensation shall be paid by the state, county, or city of permanent solvency, supported as it is by public faith and credit, and not "*liable to go up and down like that of an individual*," is security within the constitutional requirement.

Williams v. *Parker*, 188 U.S. 491, 504.
Smeaton v. *Martin*, 57 Wis. 364, 376.
Great Falls Mfg. Co. v. *Garland*, 25 Fed. Rep. 521, 529.
Cooley Const. Lim. (7th ed.) p. 816.

It is not sufficient that the provisions for compensation are such that it will probably be paid.

Conn. River R. Co. v. *County Commissioners*, 127 Mass. 50.

"The compensation must be either ascertained and paid to him [the owner] before his property is thus appropriated or an appropriate remedy must be provided and upon an adequate fund."

Bloodgood v. *Mohawk & H. R. Co.*, 18 Wend. 9–18.
Powers v. *Bears*, 12 Wis. 213.
Lewis, Eminent Domain, sec. 459.

The intimations of this court are fully in accord with the decisions that the responsibility of a private person or corporation is not an adequate fund.

Williams v. *Parker*, 188 U.S. 491.
Sweet v. *Rechel*, 159 U.S. 380–406.

(*a*) *The Massachusetts Mill Act* (*Pub. Sts. c. 190*) *violates the 14th Amendment because it denies the owner of vacant land any compensation whatever for the loss caused by flowing under the authority of said act of that portion of its market value arising from its adaptability for mill purposes.*

Fuller v. *Chicopee Mfg. Co.*, 16 Gray, 43.

In this connection we again refer to the language of some of the decisions cited in pages 31–33 of this brief:

> "In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in the sale of property between private parties. The inquiry in such cases must be, what is the property worth in the market viewed, not merely with reference to the uses to which it is at the time applied, but what is it worth from its availability for valuable uses."

Boom Co. v. *Patterson*, 98 U.S. 403.
See also *Fales* v. *Easthampton*, 162 Mass. 422.

> "The usufruct of water in a water course is inherent in the ownership of the land through which the water flows. It is often the principal element of value in the real estate of which it is a part. . . .
>
> "The permanent deprivation of this right is a taking or destruction of this property, and a diversion of the water from a stream, so as to prevent its running in its natural course, is within the constitutional provision for the protection of property."

Watuppa Reservoir Co. v. *Fall River*, 147 Mass. 548, 560, 561; (s.c.) 154 Mass. 305.

The correspondence between Metcalf and the defendant on pages 49–56 of the record shows that the land purchased of Metcalf by the defendant, at the price of $15,000, was vacant land, valuable principally for mill purposes, although Metcalf owned no mill or other property for which his water power was available.

The defendant has flowed the mill-site of the plaintiff

next above the Metcalf land, having substantially the same natural water power and of exceedingly great value to the plaintiff in connection with its ancient cotton mill and business on the premises of which the mill-site flowed is a part.

While the rights of an owner in and to land and other property are defined by the decisions of the state court, the question whether such rights constitute property is exclusively one for the Federal court.

The decisions of the state court have established the exclusive right of a riparian owner to use the natural fall of a stream through his land for mill purposes, and to use that land, in connection with that natural fall, for mill purposes; and has also established his right to enter on other land and abate any nuisance which interferes with such enjoyment of his property and to have such nuisance restrained by injunction, and to recover damages of any person erecting or maintaining such nuisance.

Such rights constitute property within the meaning of the 14th Amendment, and the Mill Act in question is unconstitutional because it authorizes the depriving of an owner of such rights without compensation.

(*b*) *This Mill Act is also unconstitutional because under its provisions one riparian owner is authorized, by an act of occupation of his land, to thereby acquire the right to flow the land of an upper proprietor, and at a later date to abandon such taking without flowing and without liability to the upper proprietor for damages resulting from such taking, and because it does not give the owner of property taken a right to compensation simultaneous with the taking, but makes such right dependent upon the future volition of the taker.*

Under section 2 of chapter 190, Mass. Pub. Sts., *as now interpreted by the state court* in the case at bar, the act

of occupation of the lower mill-site is a taking of the right to use the land above for mill purposes, that is to say, for the storing of water, and to thereby exclude the owner from the beneficial use and enjoyment of his land above. (Opinion of the Supreme Judicial Court, Record, p. 112.)

But the owner of a mill-site who has commenced occupation as such is under no obligation to continue that occupation and to flow the land of other owners. He may at any time abandon or discontinue his occupation and without any liability to the owners of other lands, who, through fear of flowage and loss of the value of improvements, have been deterred from the full enjoyment of their property. Such owners have no remedy at common law, for their lands have not been flowed or entered upon. They have no remedy under statute, for a complaint cannot be brought before the land is flowed.

Pub. Sts. c. 190, sec. 4:

"Sect. 4. A person, whose land is *overflowed* or otherwise injured by such dam, may obtain compensation therefor upon his complaint before the superior court for the county where the land or any part thereof lies; but no compensation shall be awarded for damage sustained more than three years before the institution of the complaint."

Thompson v. *Moore*, 2 Allen, 350.
Eames v. *New England Worsted Co.*, 11 Met. 570.
Storm v. *Manchaug Co.*, 13 Allen, 10.

And under the complaint provided for by section 4, *only damages caused by flowing* can be recovered.

Palmer Co. v. *Ferrill*, 17 Pick. 58.
Fuller v. *Chicopee Mfg. Co.*, 16 Gray, 46.

An upper proprietor in such case is restricted in the use and enjoyment of his land, between the commencement of occupation of a mill-site and the abandonment thereof by another, because he cannot improve his land without danger of loss of the value of such improvements by flowage. This liability to loss is a prohibition against the use and enjoyment of his land, which, unless just compensation be provided therefor, is unconstitutional.

Re Wall St., 17 Barb. 617.
Portland v. *Lee Sam*, 7 Ore. 397.
Forster v. *Scott*, 136 N.Y. 577.
Driver v. *Western Union R.R.*, 32 Wis. 569.
Edwards v. *Bruorton*, 184 Mass. 529.
Whyte v. *Kansas*, 22 Mo. App. 409.

In *Re Wall St.*, *ubi supra*, a resolution was passed by the Common Council of the city of New York to widen that street, on June 4, 1851; between that date and the report of the committee of estimate and assessment the land owner improved the land to be included in the widening by building on it. The court held that the owner was entitled to recover the value of such improvements, and in its opinion, at pages 624, 625, and 628, say, —

"On the part of the corporation there was no obligation to go on. Was there then on the part of the individual owners any obligation to stand still?

. . . . . .

"To deny to an owner the free enjoyment of his property in the only mode in which it could be enjoyed, as in this case, by building on it, and to do so from

considerations of possible or probable public advantage expected to be realized and that too for a period of indefinite duration, is, to that extent, as much and as truly a taking of private property for the public use as if the entire fee simple were assumed.

. . . . . .

"If he cannot claim, how can they control? If he gets no right to their compensation, how can they get a right to his land? The rights to be just must be mutual and to be constitutional they must be just."

In *Portland* v. *Lee Sam*, *ubi supra*, land owners erected buildings between the appointment of viewers to assess the damages which the owners would sustain by reason of the widening of a street, and the taking of the land by the adoption of their report by the common council.

It was held that the owners were entitled to the value of such improvements, the court saying in its opinion, at page 401, —

"The Common Council were under no obligation to adopt the report made by the viewers or pay for the property proposed to be taken. It was entirely optional with them whether they would go on with the widening of the street or abandon it altogether, and it would be unjust to hold that it was the duty of the respondents to cease working upon their building as soon as the viewers made their report or go on with the improvements at the peril of losing all expenditures incurred by them while awaiting the uncertain action of the Common Council."

In *Forster* v. *Scott*, *ubi supra*, the court held a statute to be unconstitutional which denied compensation to an owner for buildings erected on land included within the

limits of a proposed street as shown by a map filed by the city.

In its opinion, at pages 584, 585, the court in that case say, —

> "Whenever a law deprives an owner of the beneficial use and free enjoyment of his property, or imposes restraints upon such use and enjoyment, that materially affect its value, without legal process or compensation, it deprives him of his property within the meaning of the Constitution. All that is beneficial in property arises from its use and the fruits of that use, and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession. It is not necessary in order to render a statute obnoxious to the restraints of the Constitution, that it must in terms or in effect authorize an actual physical taking of the property or the thing itself, so long as it affects its free use and enjoyment, or the power of disposition at the will of the owner. Though the police and other powers of the government may sometimes accidentally affect property rights, according to established usages and recognized principles familiar to courts, yet even these powers are not without limitations, as they can be exercised only to promote the public good, and are always subject to judicial scrutiny. . . .
>
> "As the plaintiff in the case at bar was virtually deprived of the right to build upon his lot by the statute in question, and as this circumstance obviously impaired its value and interfered with his power of disposition, it was to that extent void as to him, and created no incumbrance upon it."

In *Isele* v. *Schwamb*, 131 Mass. 337, the court, in referring to the right to flow in a case in which it had been exercised, say, at pages 339. 340, —

> "That right was acquired by force of law, and the estate of the Sippels became subject to it. They could not destroy nor defeat nor impair it. It was a perpetual servitude to which their land was subject. . . .
>
> "The taking was for a public use for an indefinite time, and therefore in law perpetual; and the true theory of the Constitution as expounded is, that when private property is taken for public use with one hand, full and complete compensation therefor shall be tendered with the other. The right to the compensation is simultaneous with the act of taking."

See also Sabrowski v. Old Col. Ry. Co. 171 Mass 20

(c) *This Mill Act also violates the due process of law clause of the 14th Amendment, because it authorizes the flowing of the land of another and his consequent exclusion from the use thereof for the time between the flowing and the filing and recording of the verdict, usually a period of at least two years, without first requiring the payment of, or any security by attachment or otherwise for, the damages caused during that period, which damages are herein referred to as "past damages."*

The provisions of the Mill Act require a jury to assess past damages, that is, all damages sustained within three years next preceding the complaint to the time of rendering the verdict, also to determine by their verdict what sum, if any, to be paid annually to the complainant, or what sum to be paid in gross, would be a just and reason-

able compensation for all damages occasioned by flowing after the date of the verdict.

Pub. Sts. c. 190, secs. 15, 16, 18:

"Sect. 15. If the jury find by their verdict that the complainant is not entitled to recover any damages, and if such verdict is allowed and recorded, judgment shall be rendered for the respondent.

"Sect. 16. If they find that the complainant is entitled to recover damages, they shall assess the amount of damages sustained within three years next preceding the institution of the complaint and to the time of the rendering of the verdict, and, if the verdict is allowed and recorded, the complainant shall have judgment and execution for the amount of damages so assessed.

. . . . . .

"Sect. 18. They shall also ascertain and determine by their verdict what sum, if any, to be paid annually to the complainant, would be a just and reasonable compensation for the damages that may be thereafter occasioned by the dam, so long as it is used in conformity with the verdict; and also what sum in gross, would be a just and reasonable compensation for all damages thereafter to be occasioned by such use of the dam and for the right of maintaining and using the same forever in manner aforesaid."

No attachment can be made to secure a judgment for past damages.

Wight v. *Barnstable Savings Bank*, 123 Mass. 183, 184.

A verdict for past damages is not "allowed and re-

corded" until all questions of law raised at the trial are determined.

Hamilton v. *Farrar*, 131 Mass. 572, 573.

The Mill Act provides no fund or other security for the payment of past damages.

In the larger counties in Massachusetts two years elapse between the bringing of an action in the Superior Court and the trial of the case. At the trial questions of law may be raised which must be determined by the Supreme Judicial Court before the verdict can be "allowed and recorded" within the meaning of section 15.

Hamilton v. *Farrar*, 131 Mass. 572, 573.

The land flowed may have had dwelling-houses or steam mills on it.

McNally v. *Smith*, 12 Allen, 455.
Fuller v. *Chicopee Mfg. Co.*, 16 Gray, 46.

If the Mill Act denies any compensation to the owner for past damages, its constitutionality cannot be seriously maintained. Its failure to require prepayment of such damages, or security for such payment before they are suffered, is equally unconstitutional.

The flowage may utterly ruin the land and valuable improvements thereon and the past damages may be exceedingly great.

It is a well-settled rule of construction in the consideration of such statutes that "the constitutional validity of a law is to be tested, not by what has been done under it, but what may by its authority be done."

Stuart v. *Palmer*, 74 N.Y. 183, 188.

Montana Co. v. *St. Louis Mining & M. Co.*, 152 U.S. 160, 170.
Dexter v. *Boston*, 176 Mass. 247, 251.
White v. *Gove*, 183 Mass. 333, 337, 338.

The Supreme Court of the state of New Hampshire, in the case of *Ash* v. *Cummings*, 50 N.H. 591, held that the Mill Act of that state would have been unconstitutional but for section 4, which provided that —

> "No person or corporation shall derive any title from said proceedings or be discharged from any liability in relation to said terms until he or it has paid or tendered to the person aggrieved or damaged the amount of such adverse judgment."

It was held in that case that under section 4 the court would enjoin a mill owner from flowing the land of another without first giving sufficient indemnity to the owner for the damages which might be caused thereby.

In dealing with the contention that the land could be lawfully flowed without payment or adequate security for payment, the court said, on pages 615 and 616, —

> "Suppose the land owner commences proceedings to have his damages assessed as soon as he may, after the thirty days have elapsed — it may be anywhere from one to six months before he can enter the same in court; and then suppose it is referred to the committee at the first term, and they hear the parties and make report at the next term; and suppose judgment should be rendered upon the report at the second term, — the case might be settled in course of a year from the time the land was flowed, though that would be unusually speedy justice when we consider all the

delays to which such suits are liable in the course of adjustment.

"But within and during that year a man's farm may be submerged, he and his family may be drowned out of his dwelling-house like a rat out of his hole, and his castle which the king cannot enter may be taken by storm, by a flood of water; a whole gold mine in Lisbon might be flooded and rendered useless during the whole time; churches and school-houses might be inundated and ruined irretrievably. *In fact, every mischief which a flood of water can do, would or might be done before judgment, without any compensation, and before any remedy could be available.* And then, suppose the committee should find that this flowage was not of public use or benefit to the people of this State, or was not necessary for the use of the mill for which the dam was built, — how would the land-owner get his damages? Or suppose the finding is the other way, and the flowage is held to be of public benefit, &c., and a judgment is finally rendered for the actual damages done and fifty per cent. added, — what guaranty has the land-owner that the mill-owner will be responsible for that judgment when he obtains it? *The mill-owner may be wholly irresponsible when he commences to flow the land. His mill and dam and water-power and all his premises may be mortgaged for their full value before he raises the water upon the land, and he may be utterly worthless, and yet all the hope of compensation the land-owner can have is the hope that sometime in the distant future he may be able to recover a judgment against a worthless mill-owner;* or if the proceeding is terminated the other way, he may, after his property is

ruined, possibly have the privilege restored to him of bringing an action upon the case against a man without means or responsibility. In either case the landowner is forced to the alternative, to use a homely adage, of 'suing a beggar and catching a louse;' and this is the just compensation which the land owner is to receive, seasonably and certainly, for injuries and mischiefs which may have been inflicted upon him without the shadow of right, and from which he may never be able to recover himself.

"This is the construction we are asked to give to this statute. But what would be gained by such a construction? If that was what was intended by this statute, we should be forced to hold that it would be unconstitutional and void; for surely no statute could be held constitutional, which should to such an extent disregard not only the plain precepts of our constitution, but also that voice of natural justice, which speaks so plainly where the constitution is silent."

In most states, taking under the Mill Acts or analogous statutes is not permitted until the damages thereby caused are paid or secured, and usually actual payment is required.

Ala. Code (Civil) of Alabama (revision of 1897) secs. 1727 *et seq.*
Hendricks v. *Johnson*, 6 Porter (Ala.), 472, 502.
Birmingham Traction Co. v. *Birmingham Ry. & Elec. Co.*, 119 Ala. 129.

Ark. Sandels & Hill's Digest of the (Ark.) Statutes (1894 ed.), c. 58, pp. 734 *et seq.*, secs. 2804, 2805, 2806, 2807.

Cal. Constitution of the State of California, art I. sec. 14.
Steinhart v. *Superior Court*, 137 Cal. 575.

Colo. Mills' Annotated Statutes of Colorado, vol. 1, pp. 1099 *et seq.*, sec. 1725.

Conn. General Statutes Connecticut (revision of 1902), sec. 989.

Del. Delaware Revised Code (ed. of 1852 as amended 1893), c. LXI., sec. 4.

Fla. Constitution of Florida (1885), art. XVI., sec. 29.

Ga. *Chattanooga &c. R.R.* v. *Jones*, 80 Ga. 264.
Georgia &c. R.R. v. *Archer*, 87 Ga. 237.

Id. Idaho Codes, Civil Code, secs. 2615, 2616; Code of Civil Procedure, secs. 3854, 3856, 3857.

Ill. Hurd's Revised Statutes of Illinois (ed. 1903), c. 47, pp. 908 *et seq.*; c. 47, par. 10, p. 910.

Ind. Horner's Annotated Statutes of Indiana (ed. 1901), sec. 901.
Constitution of Indiana, art. I, sec. 21 (Horner's Annotated Statutes of Indiana, ed. 1901, sec. 66).

Iowa Code of Iowa Annotated (ed. 1897), sec. 1930.

Kan. General Statutes of Kansas (Dassler's Compilation of 1899), c. 66, secs. 3935, 3939.

Ky. Kentucky Constitution of 1891, secs. 13, 242.
Carroll's Statutes of Kentucky (1903 ed.), sec. 2717, also sec. 839.

La. Constitution of Louisiana (1898), art. 167.

Me. Revised Statutes of Maine (revision of 1903), c. 94, sec. 16.

Md. Public General Laws of Maryland (1904 ed.), p. 740, sec. 108.

Mich. Compiled Laws of Michigan (1897 ed.), sec. 6248.

Minn. Statutes of Minnesota (compiled 1894), c. 31.

Miss. Thompson, Dillard & Campbell's Annotated Code

of Mississippi (1892 ed.), c. 92, secs. 2893 *et seq.*, sec. 2897.

Mo. Revised Statutes of Missouri (1899 ed.), c. 131, secs. 8746, 8747, p. 2035.

Mont. Montana Codes Annotated (1895 ed.), Code of Civil Procedure, sec. 2228.

Neb. Compiled Statutes of Nebraska (1905 ed.), c. 57.

Nev. Bailey and Hammond's General Statutes of Nevada (ed. 1885), sec. 363.

N.H. *Ash* v. *Cummings*, 50 N.H. 591.

N.J. General Statutes of New Jersey (1895 ed.), vol. 2, pp. 2093, 2094.

N. Dak. Revised Codes of North Dakota (1895 ed.), c. 35, secs. 5955 *et seq.*

Ohio Bates' Annotated Ohio Statutes (4th ed.), vol. 2, secs. 3281, 6433.

Ore. Bellinger and Cotton's Codes and Statutes of Oregon (ed. 1902), vol. 2, secs. 3940, 1319.

Pa. Brightly's Purdon's Digest Pennsylvania Statutes (12th ed.), vol. 2, p. 1366, par. 9.

R.I. General Laws of Rhode Island (1896 ed.), c. 122, sec. 10.

S. Dak. Revised Statutes of South Dakota (official ed. 1903), c. 39, p. 1000, secs. 849, 851–852, 855.

Tenn. Shannon's Annotated Code of Tennessee (1896 ed.), secs. 1865, 3437–3443.

Tex. Revised Statutes of Texas (1895 ed.), p. 607, art. 3112.

Utah Revised Statutes of Utah (1898 ed.), c. 65, secs. 3588 *et seq.*

Vt. Vermont Statutes (1894 ed.), c. 159, sec. 3633.

Va. Virginia Code (1904 ed.), c. 61, sec. 1354.

Wash. Ballinger's Annotated Codes and Statutes of Washington, vol. 1, sec. 4135.
Constitution of the State of Washington, art. I., sec. 16.

W. Va. Code West Virginia (4th ed. 1899), c. XLIV., par. 32.

Wy. Revised Statutes of Wyoming (1899 ed.), sec. 3084.

Under the Massachusetts Mill Act of 1795 a land owner, upon the filing of his petition for damages, could obtain an order of the court that the respondent should give security for the payment of all damages which might be assessed. This provision for security first appeared in the act of 1795, c. 74. At that early date the legislature attached some importance to article X. of part 1 of the constitution of Massachusetts; viz.,—

> "And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor."

(*d*) *The Mill Act under consideration in the case at bar* (*Pub. Sts. c. 190*) *also violates the due process of law clause of the 14th Amendment, because it fails to require the payment in advance of damages accruing after the date of such verdict, or to provide any certain and definite fund out of which such damages shall be paid.*

The land owner may elect within three months after the verdict is allowed to take the sum awarded as gross damages.

Pub. Sts. c. 190, sec. 19:

> "Sect. 19. The complainant may in such case, at any time within three months after the verdict is al-

lowed and recorded, elect to take the sum so awarded in gross for the right to maintain and use the dam forever, instead of receiving the annual compensation therefor; and if he makes such election, he shall within said three months cause the same to be entered on the record of the case in the clerk's office."

The owner of the dam may, at any time within three months after such election by the land owner, elect to abandon the dam and thereby terminate any liability under the Mill Act for gross damages, ~~accruing after such abandonment~~.

Pub. Sts. c. 190, sec. 20.
Hunt v. *Whitney*, 4 Met. 603.

Section 20 is as follows: —

"Sect. 20. The owner or occupant of the mill or dam shall, within three months after such election is entered, pay to the complainant, or secure to his satisfaction, said sum with interest from the time of the verdict. After the expiration of said three months, and until payment of said damages and interest, such owner or occupant shall lose all benefit of the provisions contained in this chapter."

If, however, the mill owner refuses to pay or secure the payment of gross damages, the only security the land owner has for such payment is a lien on the mill-dam and mill and the land under and adjoining the same; such lien dating back to the institution of the original complaint, that is, to a time not prior to the flowing.

Pub. Sts. c. 190, secs. 22, 24.

Sections 22 and 24 are as follows: —

"Sect. 22. The person entitled to receive said annual compensation or gross damages shall have a lien therefor, from the time of the institution of the original complaint, on the mill and mill-dam with their appurtenances, and on the land under and adjoining the same and used therewith; but such lien shall not extend to any sum due more than three years before the commencement of an action therefor."

"Sect. 24. The execution issued on such judgment may, at any time within thirty days after the judgment is rendered, be levied on the premises so subject to the lien; and the officer may thereupon proceed to sell such premises, or so much thereof as is necessary to satisfy the execution and all charges of levying it. The officer shall proceed in making the sale in like manner in all respects as is provided with regard to the sale on execution of a right to redeem real estate mortgaged, and the sale shall be valid and effectual against all persons claiming the premises by any title which has accrued within the time covered by the lien."

The dam, however, may be of the cheapest construction; the mill may consist of a water wheel and cheap dynamo, and the electrical power thus generated may be sold and transmitted to other owners for the working of their mills. It is obvious that the damages suffered may far exceed the value of the property subject to the lien; and that such property may have been attached for debt for its full value, or incumbered by a large mortgage before the land was flowed or the complaint was brought. The land owner, however, may maintain an action of contract for the gross damages, not against the one who erected the dam, but only against the person who owns or

occupies the mill when the action is brought; for if, before or after the verdict awarding gross damages, the person erecting the dam conveys the premises to another, such owner is relieved from all liability arising from the award for gross damages.

Pub. Sts. c. 190, sec. 23.
Leland v. *Woodbury*, 4 Cush. 245.

Section 23 is as follows: —

"Sect. 23. Such person may maintain an action of contract therefor in the Superior Court against the person who owns or occupies the mill when the action is brought, and shall in such action recover the whole sum due and unpaid for the three years then last past, whoever has owned or occupied the mill during that time; and he shall be entitled to full costs, although the sum recovered does not amount to twenty dollars."

Apparently the execution issued on that judgment can be levied only on the property subject to the lien.

Pub. Sts. c. 190, sec. 24, *supra*.

Since this case was brought legislation has been enacted which subjects other property to levy of the execution.

Rev. Laws, c. 196, sec. 16:

"Section 16. The execution issued on such judgment, *if not otherwise satisfied* may, within thirty days after judgment, be levied on the land so subject to the lien; and the officer may thereupon sell, in the manner provided for the sale of land on execution, such land or so much thereof as is necessary to satisfy the execution and the expenses of the levy. Such sale

shall be valid against any claim which has accrued within the time covered by the lien."

The words "*if not otherwise satisfied*" were in the Mill Act contained in Revised Statutes (compilation of 1836), were dropped from the General Statutes (compilation of 1860) and from Public Statutes (compilation of 1882), which last were in force at the time of the acts complained of in this suit, and at the time of the institution of this suit, and were inserted in Revised Laws (compilation of 1902).

In case the land owner elects to take annual damages, the remedies by lien and action are the same.

The land owner is confined to the remedies afforded by section 28.

"Sect. 28. No action shall be sustained at common law for the recovery of damages for the erecting, maintaining or using of a mill or mill-dam, except as provided in this chapter."

Dean v. *Colt*, 99 Mass. 486.

Since the case at bar was brought an attempt has been made, by the enactment of section 19 of chapter 196 of the Revised Laws, to meet the objection that the remedies provided by the Mill Act are inadequate and unconstitutional.

Rev. Laws, sec. 19:

"Sect. 19. No action shall be maintained at common law for the recovery of damages for the erection, maintenance or use of a mill or mill-dam, if a remedy therefor is provided in this chapter."

The state court, in its opinion in the case at bar, devotes

a few lines to the assertion that the Mill Act is constitutional.

Certainly if the learned chief justice of that court has failed to state any good reason for holding that this Mill Act does not violate the due process of law clause of the 14th Amendment, or to cite cases in support of the court's decision, it will be readily admitted that the cause of the defendants is lamentably weak.

We briefly consider the opinion of the Supreme Judicial Court in the case at bar. (Record, pp. 112, 116.)

> "We do not deem it necessary to consider at any length the constitutionality of this statute. It has often been considered and discussed in previous decisions and it has uniformly been affirmed."

The statement quoted is accurate if limited to the decisions of the Supreme Judicial Court of Massachusetts in cases arising under the state constitution.

It is believed that there is no state or Federal case in which a Mill Act similar to the Massachusetts statute, in failing to require prepayment of full compensation, or security for such payment, before the flowing, has been held to be constitutional.

The state court, in its opinion in the case at bar, thus proceeds:

> "It is urged that the provision for the payment of damages is inadequate. This argument is founded mainly on an assumption that there is a taking of property under the right of eminent domain."

The court is mistaken in this statement. The position of the plaintiff in this case before that court was that it

was immaterial whether the taking was under the right of eminent domain or under the power to enact wholesome laws, because in either aspect it had a constitutional right to just compensation.

The state court, in the case at bar, then takes the position that the proceedings under the Mill Act do not constitute a taking of property, or, if a taking, are not under the right of eminent domain, but under the police powers of the state, using the following language: —

> "But whatever may be the interference with the use of a neighboring property by an appropriation of a mill site, it is not a taking under the right of eminent domain. *Murdock* v. *Stickney*, 8 Cush. 113. *Hazen* v. *Essex Company*, 12 Cush. 475. *Lowell* v. *Boston*, 111 Mass. 454, 464. *Turner* v. *Nye*, 154 Mass. 579. *Head* v. *Amoskeag Mfg. Co.*, 113 U.S. 9."

In *Murdock* v. *Stickney*, *ubi supra*, the state court decided that the Mill Act does not apply to tide mills, and, commencing at page 116 in its opinion, made the statement which probably led to the citation of that case:

> "The principle on which this law is founded is not, as has sometimes been supposed, the right of eminent domain, the sovereign right of taking private property for public use. *It is not in any proper sense a taking of the property of an owner of the land flowed*, nor is any compensation awarded by the public. It does not even authorize the mill owner to use the land of another for a reservoir, against his consent; the owner of the land may if he choose, dike

out his meadow, and thereby prevent the flow of the water upon it. . . .

"Whether if this were an original question, this legislation would be considered as trenching too closely upon the great principle, which gives security to private rights, it seems now too late to inquire, such legislation having been in full operation in this state a century and a half, but we think the principle itself is manifest."

In *Hazen* v. *Essex Co.*, *ubi supra*, the court decided that a corporation created by special act was not liable to an action at law for the flowing of land by a dam erected in accordance with such act, and the only remedy was that given under the act of incorporation. The decision of the court was put expressly on the ground that the taking was the exercising of the right of eminent domain.

In *Lowell* v. *Boston*, *ubi supra*, the court, in deciding that the statute authorizing the city to issue bonds and loan the proceeds to owners of land, the buildings upon which were burned, was unconstitutional, said, —

"It is doubtless within the power of the legislature to declare the existence of a public exigency for the establishment of a mill, for which the right of eminent domain may properly be exercised; as in the case of the Boston & Roxbury Mill Corporation and the Salem Mill-dam corporation. What may be the limits of legislative power in that direction, and whether there are any limits except in the sound discretion of the Legislature, it is needless now to inquire. We are satisfied that the mill acts are not founded upon that power, and do not authorize its exercise," and con-

tinuing the discussion, the court, at page 466, say, "A consideration still more conclusive to this point is, *that in fact no private property, or right in the nature of property, is taken by force of the mill acts, either for public or private use.* They authorize the maintenance of a dam to raise a head of water, although its effect will be to overflow the land of another proprietor. This right of flowage is sometimes inaccurately called an easement. *Hunt* v. *Whitney*, 4 Met. 603. *Talbot* v. *Hudson*, 16 Gray, 417, 422, 426. But it is not so. It confers no right in the land upon the mill owner and takes none from the land owner. (*Murdock* v. *Stickney*, 8 Cush. 113; *Storm* v. *Manchaug Co.*, 13 Allen, 10.) In *Murdock* v. *Stickney*, Chief Justice SHAW remarks in reference to the mill acts, 'The principle on which this law is founded is not, as has sometimes been supposed, the right of eminent domain, the sovereign right of taking private property for public use. It is not in any proper sense a taking of the property of an owner of the land flowed, nor is any compensation awarded by the public.'"

In *Turner* v. *Nye*, *ubi supra*, the court decided that the statute authorizing the flowage of lands for the purpose of creating a pond for the culture of useful fishes is constitutional, and in the course of its opinion, at page 583, said, with reference to the statute under consideration, —

> "It is to be erected 'upon the terms and conditions and subject to the regulations contained in chapter one hundred and ninety of the Public Statutes so far as the same are applicable in such cases.' The chapter referred to is what is known as the mill act.

Under that it has been held that the right to erect and maintain a dam to raise water for working a mill does not give to the mill owner any right in the land flowed, or take away any right of the land owner. The latter may embank his land and thus stop any flowage of it, or, if he chooses, he may collect of the mill owner damages in gross or annually for the flowage. Until the land owner manifests his election to claim damages, he cannot be compelled by the mill owner to submit his land to be flowed, and until then the only right which the mill owner has as between himself and the land owner, is to maintain his dam without liability to the land owner for damages in an action at law. While the land owner may protect his land from flowage, he cannot, of course, wantonly interfere with the right which the statute gives to the mill owner to maintain his dam."

The proceedings under the Mill Act, whereby the plaintiff lost the right to use its land for general purposes, as well as for mill purposes, and whereby the defendant acquired the right to flow the plaintiff's land and to use it for a mill pond and to take from the plaintiff for the defendant's use more than twelve feet of the fall of the stream on the plaintiff's land, is a taking of property, as held by the decisions of this and other courts.

The statement contained in the foregoing cases cited in the extract from the opinion of the state court in the case at bar, to the effect that an interference with the rights of a land owner, which forces him either to have his lands flowed by a lower owner or to incur the expense of building an embankment and thereby flow it to the same extent, is not a taking, is opposed to the decisions of this

court. Eminent judges of the Supreme Court of Massachusetts have refused to subscribe to it, and it is generally condemned by courts of other jurisdictions as well as by learned authors.

Turner v. *Nye*, 154 Mass. 579, 586.
Kenison v. *Arlington*, 144 Mass. 456, 457.
Isele v. *Bank*, 135 Mass. 142, 144.
Isele v. *Schwamb*, 131 Mass. 337.
Chase v. *Sutton Mfg. Co.*, 4 Cush. 152, 169, 170.
Boston & Roxbury Mill Corp. v. *Newman*, 12 Pick. 467.
Talbot v. *Hudson*, 16 Gray, 417, 425, 426.
Avery v. *Vermont Electric Co.*, 75 Vt. 235.
Lewis, Eminent Domain, sec. 183.

The state court, in its opinion in the case at bar, then asserts that the proceedings are under the police powers, and that the validity of the Mill Act is not dependent on compensation to owners of lands flowed, saying,—

> "It is unnecessary to determine in this case what constitutional rights one has, in reference to damages for an interference under the statutory authority with his right at common law to use the water of a stream without obstruction, where such an interference is permitted in the regulation of the rights of the different owners, as necessary to an advantageous use of the power; nor is it important now to decide what principles will hereafter be applied in assessing the damages of the present plaintiff in view of existing conditions."

On the contrary, it was of vital importance for the state court to determine whether the Mill Act does require payment to the owner of land flowed of full compensation for *all* the damages authorized by the proceedings under it, and whether it does make an *adequate provision for the payment of all such damages* by prepayment of the same or security for such payment.

The opinion continues, —

> "It is enough to say that in our opinion the provision for compensation for damages is adequate to meet such constitutional requirements as are applicable to a statute of this kind."

The language just quoted can be interpreted only to express an opinion that when property is taken in the exercise of the police powers of the state, the constitutional requirements may be satisfied by a provision for compensation which would be inadequate if the same taking had been made under the right of eminent domain. This is manifest error. The state, in the exercise of the police powers, may prohibit, without compensation to the owner, any use of property injurious to the health, morals, or safety of the community; but it cannot, even in such case, take such property without adequate provision for compensation, and much less can it, without compensation, deprive an owner of the right to the beneficial enjoyment of his property for general purposes in order that another person may use such property for a single purpose.

Austin v. *Tennessee*, 179 U.S. 343, 344
Commonwealth v. *Alger*, 7 Cush. 53, 84.
Sweet v. *Rechel*, 159 U.S. 380, 398.
Smyth v. *Ames*, 169 U.S. 466.

Miller v. Horton 152 Mass 540,

Bent v. *Emery*, 173 Mass. 495.
Yates v. *Milwaukee*, 10 Wall. 497.
Pumpelly v. *G.B. & M. Canal Co.*, 13 Wall. 166.
Barney v. *Keokuk*, 94 U.S. 324.

The state court, in the case at bar, concludes its constitutional exposition of the law in the following language: —

> "Even in cases arising under statutes which authorize an exercise of the right of eminent domain, it has been held that similar provisions are sufficient to satisfy the language of the constitution. *Boston & Roxbury Mill Co.* v. *Newman*, 12 Pick. 467. *Brickett* v. *Haverhill Aqueduct Co.*, 142 Mass. 394."

In *Brickett* v. *Haverhill Aqueduct Co.*, *ubi supra*, the legislature authorized a private aqueduct corporation to take and use the waters of great ponds belonging to the commonwealth as a water supply for the inhabitants of the town of Haverhill, and provided that all damages sustained by the taking of land, water, or water rights should, in case of disagreement with the parties injured, be ascertained and recovered under the Public Statutes of Massachusetts, c. 49, relating to takings for highways, but did not require either the prepayment of compensation or security for such payment. The court in that case sustained the constitutionality of the statute upon the ground that numerous similar statutes had been passed and acquiesced in, and on the further ground that the land owner under Public Statutes, c. 110, sec. 18, was entitled to a warrant of distress to compel the payment of his damages, and if that

was ineffectual, to relief in equity restraining the aqueduct company from committing further damages, and ordering the removal of the dam. In other words, *Brickett* v. *Haverhill Aqueduct Co.* decided that a right of action was a sufficient provision for compensation within the meaning of the state constitution, supplemented, as it was, by a right to restrain further damage if the provision proved ineffectual. It is interesting to note in this connection that the statute afforded the land owner injured by the takings of the aqueduct company no security for the payment of damages, while in highway takings there is the liability of a city or county for such payment; and in the exercise of eminent domain by railroad corporations security is required for the payment of damages and costs before the occupation of the property taken is permitted.

Pub. Sts. c. 112, sec. 97.

Brickett v. *Haverhill Aqueduct Co.* is inconsistent with the Federal decisions. It involved no question of the validity of the acts of the defendant in that case under the Federal Constitution, and its authority is questioned in the very recent case of *The Gloucester Water Supply Co.* v. *City of Gloucester*, 179 Mass. 365.

The notion expressed in the opinion in the case at bar and in some other of the Massachusetts cases, that under the police powers property rights may be taken without compensation (Opinion of KNOWLTON, J., in *Attorney General* v. *Williams*, 174 Mass. 476), has been noticed by this court.

Williams v. *Parker*, 188 U.S. 491.

VII.

The Massachusetts Mill Act violates the 14th Amendment because it authorizes the taking of private property for private purposes.

The 14th Amendment prohibits the taking of private property for any but public purposes.

Cole v. *LaGrange*, 113 U.S. 1.
Fallbrook Irrigation Dist. v. *Bradley*, 164 U.S. 112.
Missouri P.R. Co. v. *Nebraska*, 164 U.S. 403.

Taking property from one party who holds it for public use, by another, to hold it for the same public use, is a violation of the 14th Amendment.

Cary Library v. *Bliss*, 151 Mass. 364.

It is evident that if it should be held that the taking of the plaintiff's property was not completed until that property was flowed by the defendant, such taking would be a violation of the 14th Amendment because, at the time thereof, the plaintiff's land and power were devoted by the plaintiff to the same uses for which they were taken by the defendant.

It may be that a Mill Act can be upheld as a valid exercise of the police powers which authorizes one riparian proprietor to flow the land of another when, without such flowage, neither owner could develop any power; or which encourages great manufacturing interests by authorizing flowage, for mill purposes, of tillage or pasture land of comparatively little value, or which provides for a public mill to serve the public needs under conditions of society which would make it difficult to otherwise supply them.

Such considerations do not apply to the case at bar, in which the defendant, having a water privilege with a fall of 38.12 feet, for the purpose of operating its mill for the manufacture of fabrics (Master's Report, Record, p. 42), is attempting to take from the plaintiff 12.88 feet of its privilege of 18.56 feet despite the fact that such privilege was bought, held, and used by the plaintiff for operating its own mill, which is also devoted to the manufacture of fabrics.

The public welfare is not promoted by having the water power of one mill owner grabbed and used by another to operate the latter's mill.

When a Mill Act was first enacted in Massachusetts, water power only was used for operating mill machinery. Now steam and water mills are manufacturing the same kind of goods side by side.

It cannot be seriously contended that if all Mill Acts were wiped out of existence, the demands of the market and the needs of the public would not be served as fully and satisfactorily as at the present time.

The Mill Act under consideration authorizes a riparian proprietor, for the purposes of a water-mill, to flow out and destroy a steam-mill even though the latter antedates in construction the water-mill and is used for manufacturing the same kind of goods.

The public welfare is not promoted by having a mill owner use water power rather than steam power for manufacturing purposes.

The Mill Act under consideration, in its application to cases like the one at bar, cannot be upheld by any real or supposed analogy between the rights of tenants in common and those of riparian proprietors.

In cotenancy the title of each tenant extends to every part

of the whole, and neither cotenant has the right to exclude the other from any part of the common premises.

Each riparian proprietor, however, has the right at common law to exclude all other riparian proprietors from his land or from any use of the water as it flows through his land.

No riparian proprietor has the right to divert the stream from the land of another or flow such land, or send the water down to it in a polluted condition.

Community of interest in the lands of each other, or in the water as it flows through each other's land, is utterly lacking.

The obligation of each riparian owner is merely that of a land owner, to do nothing to interfere with another's rights.

The stream is an incident to the land, and not the land to the stream.

Avery v. *Vermont Electric Co.*, 75 Vt. 235.

The case at bar is readily distinguishable from the irrigation and drainage cases, in which one of many owners in severalty of a large tract of property is compelled to pay his just share of the expense of improving the entire tract when such improvement would otherwise be impracticable. Such regulation of the rights of ownership is based upon considerations of public welfare.

Fallbrook Irrigation Dist. v. *Bradley*, 164 U.S. 112.

Wurtz v. *Hoagland*, 114 U.S. 606.

It is likewise distinguishable from those cases in which, where a general condition has made it almost essential to

the growth of a state that land owners should have the right to cross the lands of other owners to obtain a supply of water necessary to the use of the land, a statute authorizing them to do so has been upheld.

Clark v. *Nash*, 198 U.S. 361.

In *Head* v. *Amoskeag Mfg. Co.*, 113 U.S. 9, this court sustained a Mill Act which, as is most fully set forth in *Ash* v. *Cummings*, 50 N.H. 591, required an adjudication of public utility, prepayment of damages or security for such payment, and which prohibited the erection of a dam affecting any mill on the same stream. The language of this court in the opinion is significant:

> "The statute does not authorize new mills to be erected to the detriment of existing mills and mill privileges. And by providing for an assessment of full compensation to the owners of lands flowed, it avoids the difficulty which arose in the case of *Pumpelly* v. *Green Bay Co.*, 13 Wall. 116."

A statute which deprives a mill owner of the right to develop a natural water power on his land does affect his mill. Ellis v. Hooker Co. v. Williams. 36 Conn. 310, *Occum Co.* v. *Sprague Mfg. Co.*, 35 Conn. 496.

The decision in *Head* v. *Amoskeag Mfg. Co.* should at least be limited to the class of statutes under consideration in that case.

Thus limited it does not sustain the constitutionality of the Massachusetts Mill Act in its application to the case at bar, because the Massachusetts Mill Act, unlike the New Hampshire statute, does not require any adjudication of

public utility, and does not require, in advance of flowing, any payment, or security for the payment, of compensation for "past damages," so called, and does not require, in advance of the flowing, any payment, or adequate security for the payment, of compensation for the damages occurring after verdict, and because the Massachusetts Act does authorize the flowing out and destruction of a natural water power forming a part of a mill-site on which there is in actual operation and use an ancient mill, for the working of which the water power destroyed was bought, intended, and needed, and does authorize the appropriation of that power which is taken from the owner to the private use of the taker for the very purposes for which the owner bought, needed, and intended it.

In considering the constitutionality of the Massachusetts Mill Act, present conditions may well be held to render a statute unconstitutional which, many years before, under entirely different conditions, might be held to be constitutional, just as the conditions in one state may support a statute which in a different state, under different conditions, would clearly be invalid.

Clark v. *Nash*, 198 U.S. 361.

In *Stowell* v. *Flagg*, 11 Mass. 364, at 368, the court say, —

> "I cannot help thinking that this statute was incautiously copied from the ancient colonial and provincial acts, which were passed when the use of mills, from the scarcity of them, bore much greater value, compared to the land used for the purposes of agriculture, than at present. But with this we have nothing to do. As the law is, so we must declare it."

The following cases are opposed to the view that flowing under such a Mill Act as the one in question can be upheld as a taking for a public use or for the public welfare: —

Ryerson v. *Brown*, 35 Mich. 333.
Water Power Co. v. *Circuit Judge*, 133 Mich. 48.
Tyler v. *Beacher*, 44 Vt. 648.
Avery v. *Vermont Electric Co.*, 75 Vt. 235.
Gaylord v. *Sanitary District*, 204 Ill. 576.
Sadler v. *Langhorn*, 34 Ala. 311.
McCulley v. *Cunningham*, 96 Ala. 583.
Loughbridge v. *Harris*, 42 Ga. 501.
Crenshaw v. *River Co.*, 6 Rand. 245.

The following cases contain an intimation that if it were a new question Mill Acts would be held to be unconstitutional: —

Jordan v. *Woodworth*, 40 Me. 317.
Flemming v. *Hull*, 73 Iowa, 598.
Harding v. *Funk*, 8 Kan. 315.
Miller v. *Troost*, 14 Minn. 365.
Fish v. *Horicon Iron Co.*, 10 Wis. 351.
Atty. Gen. v. *Eau Claire*, 37 Wis. 400.
Murdock v. *Stickney*, 8 Cush. 113.

By the 14th Amendment the validity of the constitutions and statutes of the states then or thereafter existing were made subject to the test of the due process of law clause of the 14th Amendment as interpreted by the Supreme Court of the United States.

Neal v. *Delaware*, 103 U.S. 370.

Kaukauna Water Power Co. v. *Green Bay & M. Canal Co.*, 142 U.S. 254.
Chicago, B. & Q. R. Co. v. *Chicago*, 166 U.S. 226, 239.
Wood v. *Fitzgerald*, ~~103 U.S. 370.~~ 3 Oregon 568
Portland v. *Bangor*, 65 Me. 120.

While peculiar local conditions may exist in one state which give a public character to a use by one person of the land of another and justify a statute in that state which would be clearly unconstitutional if enacted under dissimilar conditions, —

Clark v. *Nash*, 198 U.S. 361;
Wurtz v. *Hoagland*, 114 U.S. 606, —

yet the 14th Amendment protects the property rights of the citizens of the United States in every state by prohibiting the taking of the same for private purposes and by requiring an adequate provision for the payment of full compensation to owners deprived of property rights either by the exercise of the right of eminent domain or of the police powers.

This court, therefore, in dealing with the case at bar, is unaffected by considerations of contemporaneous construction and acquiescence which have led different state courts to diverse conclusions.

Chicago, B. & Q. R. Co. v. *Chicago*, 166 U.S. 226, at page 239, where this court say, —

"In *Scott* v. *Toledo*, 36 Fed. Rep. 385, 395–396 (1 L.R. A. 688), the late Mr. Justice JACKSON, while circuit judge, had occasion to consider this question. After full consideration that able judge said: 'What-

ever may have been the power of the states on this subject prior to the adoption of the Fourteenth Amendment to the Constitution, it seems clear that, since that amendment went into effect, such limitations and restraints have been placed upon their power in dealing with individual rights that the states cannot now lawfully appropriate private property for the public benefit or to public uses without compensation to the owner; and that any attempt so to do, whether done in pursuance of a constitutional provision or legislative enactment, whether done by the legislature itself or under delegated authority by one of the subordinate agencies of the State, and whether done directly, by taking the property of one person and vesting it in another or the public, or indirectly through the forms of law, by appropriating the property and requiring the owner thereof to compensate himself, or to refund to another the compensation to which he is entitled, would be wanting in that "due process of law" required by said amendment. The conclusion of the court on this question is, that since the adoption of the Fourteenth Amendment compensation for private property taken for public uses constitutes an essential element in "due process of law," and that without such compensation the appropriation of private property to public uses, no matter under what form of procedure it is taken, would violate the provisions of the Federal Constitution.' To the same effect are *Henderson* v. *Central Passenger Railway*, 21 Fed. Rep. 358, and *Baker* v. *Village of Norwood*, 74 Fed. Rep. 997."

A Mill Act authorizing an interference with private

property rights, by flowing without prepayment of compensation or security for such payment, cannot, in the Federal sense, be a violation of the 14th Amendment if enacted in New Hampshire, and be in accord with that amendment if enacted in Massachusetts.

Ash v. *Cummings*, 50 N.H. 591.
Otis Co. v. *Ludlow Mfg. Co.*, 186 Mass. 89.

Neither can a Mill Act enacted in Michigan be a violation of the 14th Amendment because of recent enactment and a compliance with it in Massachusetts because of ancient origin.

Ryerson v. *Brown*, 35 Mich. 333.
Water Power Co. v. *Circuit Judge*, 133 Mich. 48.
Otis Co. v. *Ludlow Mfg. Co.*, 186 Mass. 89.
Murdock v. *Stickney*, 8 Cush. 113, 116.

Nor can a Massachusetts statute be held constitutional in spite of the ambiguity in the act of taking, and a Maine act unconstitutional by reason of the same ambiguity.

Otis Co. v. *Ludlow Mfg. Co.*, 186 Mass. 89.
Hamor v. *Bar Harbor Water Co.*, 78 Me. 127.

Neither, under the 14th Amendment, can a given use under similar conditions be upheld as a public one for the public welfare in Massachusetts and as a strictly private one in Vermont.

Otis Co. v. *Ludlow Mfg. Co.*, 186 Mass. 89.
Avery v. *Vermont Electric Co.*, 75 Vt. 235.

Nor can this court, which has refused to follow its own earlier decisions conflicting with the constitution, —

Legal Tender Cases, 12 Wall. 457, 553, —

be expected to regard the opinions of the state courts as of controlling force in the decision of the Federal questions involved in the case at bar.

A decision that the Mill Act in question is unconstitutional will not seriously affect vested interests.

Title to the water powers has been fixed by purchase, user, and acceptance of damages.

Lewis, Eminent Domain, sec. 181.

Respectfully submitted,
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SUPPLEMENTAL.

Laches and Waiver.

The defendant's claim of laches is untenable. (Record, pp. 64, 67.)

Twenty-eighth ruling requested by defendant and refused. (Record, pp. 79, 80.)

Attorney General v. *Algonquin Club*, 153 Mass., 447, 453.
Linzee v. *Mixer*, 101 Mass., 512, 527.

The record does not support the statement that the plaintiff filed a complaint for damages under the Mill Act.

Waiver is not a Federal question.

Electric Co. v. *Dow*, 166 U. S., 489.
Pierce v. *Somerset Ry. Co.*, 171 U. S., 641.

Filing such a complaint is not a waiver under the Massachusetts rule.

Moore v. *Sanford*, 151 Mass., 285.

APPENDIX.

MASSACHUSETTS STATUTES.

PROVINCE LAWS, 1709–1710, c. 1.

An act for the upholding and regulating of mills.

Whereas frequently there are divers partners, owners of mills erected for the common use and benefit of the respective towns wherein they are, and ofttimes improved by the inhabitants of neighboring towns, and forasmuch as by reason of the disagreements death or decay of some of the partners, or perplexity by entail among their descendants, mills sometimes fall to despair and are rendered useless and unserviceable, if not totally demolished, to the hurt and detriment of the public as well as loss to (the) other (the) partners who stand ready to advance their parts of the charge for repairing, mending or rebuilding of the same, be it therefore enacted by his excellency the governor, council and representatives in general court assembled, and by the authority of the same,

That when and so often as it shall happen any mill or mills, mill dam, flood gates, *sluces*, running gear or appurtenances, to be demolished, broken, worn out or stand in need of repair and amendment, it shall and may be lawful to and for any one or more of the partners on knowledge thereof, to notify and summon a general meeting of the whole at the said mill or mills on a certain day (or) (and) time within 15 days next after the issuing of such notification or summons, to consult and agree about

the rebuilding or repairing of such mill or mills or appurtenances or defects therein, to make them serviceable.

And if any partner being so notified shall neglect to attend such meeting, or being met shall refuse to agree with the major part of the interested for repairing, rebuilding and fitting up of such mill or mills, so as to make them serviceable, or to pay his part of the cost and charge thereof, the rest of the partners being the major part of the interested may direct and cause the same to be done, and shall be reimbursed and pay such sum or sums as they or any of them shall advance and disburse thereon over and above their own respective shares and proportion with interest for the same in interim, out of said mill or mills or the profits or earnings thereof, and it shall and may be lawful for them and they are hereby empowered to demand, sue for, recover, and receive the same accordingly: any law, usage or custom to the contrary notwithstanding.

And be it further enacted by the authority aforesaid,

That every miller shall be provided of scales and weights to weigh grain to and from the mill if desired; and the toll for grinding all sorts of grain shall be 1/16th part and no more, any law, usage or custom to the contrary notwithstanding: provided That nothing herein contained shall be construed to annul or make void any particular contract or contracts made or to be made respecting the repairs of any mill or mills.

Passed June 17, published June 18.

PROVINCE LAWS, 1728–1729, c. 4.

An act in addition to and rendering more effectual an act entitled "An act for the upholding and regulating of Mills" made and passed at a session of the Great and General Court or Assembly begun and held at Boston upon Wednesday the 25th day of May in the 8th year of the reign of the late Queen Anne, Annoque Domini 1709.

Whereas great complaint is made by inhabitants of the towns of Boston and Charlestown that they are misused by the millers in not grinding their corn seasonably and oft-times detaining it for a long time under ground, to their great damage, and also that they are very much defrauded by the millers in taking unreasonable toll:

Be it therefore enacted by the Lieutenant Governor, Council and representatives in general court assembled and by the authority of the same That every miller within the towns of Boston and Charlestown who shall not be provided with suitable scales and weights, sealed as the law directs, for weighing corn and meal in his mill, within the space of two months after the publication hereof, shall forfeit and pay the sum of ten pounds; one half to His Majesty for and towards the support of this government, and the other half to him or them that shall inform and sue for the same in any court of record in the countys of Suffolk or Middlesex.

And be it further enacted, That every miller in the towns of Boston and Charlestown who shall not be provided with suitable scales, weights, sealed as the law directs for the end aforesaid, and shall continue in the neglect thereof after the expiration of the said two months, shall forfeit and pay the sum of five pounds for every month he shall con-

tinue in such neglect, to be recovered and disposed of as is hereinbefore mentioned; and if any miller in the said towns of Boston and Charlestown after the expiration of the said two months do or shall presume to take a greater quantity of toll than a sixteenth part for any sort of grain by him ground, and be thereof convicted, he shall forfeit and pay for each offence the sum of five pounds, to be recovered and disposed of in manner as aforesaid; and if any miller in the said towns of Boston and Charlestown shall refuse to weigh corn, grain or meal brought or carried from his mill when desired, he shall for every such refusal forfeit and pay the sum of five shillings, to be recovered before any justice of the peace within the counties of Suffolk or Middlesex, by him or them that shall inform or sue for the same,

And be it further enacted, That when any of the inhabitants of the towns of Boston or Charlestown, shall send any grain to be ground at the mills for the use of their families, the miller or millers shall receive into the mills all such grain, and within the space of three days at least, take care that the same be ground, on pain of forfeiting the sum of ten shillings for every such neglect, and the sum of five shillings more for every day such grain shall be unground (except in extraordinary cases the mill is prevented working) to be recovered before any of His Majesties justices of the peace in the counties of Suffolk and Middlesex.

Passed June 19, published June 24.

PROVINCE LAWS, 1713–1714, c. 9.

An Act in addition to the Act for upholding and regulating of Mills.

Whereas it has been found by experience that, when some persons in this province have been at great cost and expense for building of mills serviceable for public good and benefit of the town, or considerable neighborhood, in or near to which they have been erected; that *in raising a suitable head of water for that service, it hath sometimes happened that some small quantity of lands or meadows have been thereby flowed and damnified, not belonging to the owner or owners of such mills or mill, whereby several controversies, and law suits have arisen: for prevention whereof for the future, —

Be it therefore enacted by his excellency the Governor, Council and Representatives in General Court assembled, and by authority of the same, That where any person or persons have already, or shall hereafter, set up any water mill or mills upon his or their own lands, or with the consent of the proprietors of such lands legally obtained, where upon such mill or mills, is or shall be erected or built; that then such owner or owners shall have free liberty to continue and improve such pond for their best advantage, without molestation. And if any person or persons find themselves aggrieved and damnified in their propriety of lands, by its being flowed by the owner or occupant of such mills stopping or raising the water, that in every such case, the party so damnified in his propriety, upon application for relief to the Court of General Sessions of the Peace in the county where such mills or pond is; the said Court be and hereby are empowered to sue out a warrant directed to the sheriff of the same county,

to summon and empanel a jury of good and lawful men at the proper cost and charge of the owner or owners of such mill or mills; and the jury shall be sworn by a justice of the peace, to a faithful indifferent appraisal of the yearly damage done to the person complainant, by flowing his or their land as aforesaid.

STATUTES 1795, c. 74.

An Act for the Support and Regulation of Mills.

Whereas the erection and support of Mills, to accommodate the Inhabitants of the several parts of the State, ought not to be discouraged by many doubts and disputes, and some special Provisions are found necessary relative to flowing adjacent lands and mills held by several proprietors — Therefore —

Sec. 1st. *Be it enacted by the Senate and House of Representatives in General Court assembled, and by the Authority of the same*, that where any person hath already erected or shall erect any water mill on his own land, or on the land of any other person, by his consent legally obtained, and to the working of such mill it shall be found necessary to raise a suitable head of water, and in so doing any land should be flowed not belonging to the owner of such mill, it will be lawful for the owner or occupant of such mill to continue the same head of water to his best advantage, in the manner, and on the terms hereinafter mentioned.

Sec. 2d. *And be it further enacted*, that if any person shall sustain damages in his lands by their being flowed as aforesaid, he may complain to the Court of Common Pleas of the county wherein the land so flowed shall be situated, and the said court shall issue a warrant

to the sheriff of the same county; and if the sheriff shall be interested, then to some coroner of the same county not interested, such sheriff or coroner to be named by the court, directing him to summons and impanel a jury of twelve good and lawfull men; which jury shall be sworn to make a true and faithful appraisement of the yearly damages done to the complainant by so flowing his lands, and how far the same may be necessary. And said jury shall try the case; and their verdict, being returned by the officer to the same court, and there allowed and recorded, shall be a sufficient bar to any action to be brought for any such damages. And it shall be in the power of said Court to assess such sum to the officer, for his services, as they may judge reasonable.

Sec. 3d. *And be it further enacted*, that such verdict and judgment thereon so recorded, shall be the measure of the yearly damages, until the owner or occupant of such mill, or the owner or occupant of such lands so flowed, shall, on a new complaint to the said court of the county, and by the form of process before prescribed, obtain an increase or decrease of the said damages. And the party intitled to any such yearly damages, whether the party to the record, his heirs, executors, administrators or assigns, may have an action of debt grounded on such record, to recover the same. And the party prevailing in any complaint or action aforesaid shall be allowed his full legal costs, though the damages so assessed or debt recovered, shall not amount to the sum of four pounds.

Sec. 4th. *And be it further enacted*, that if any person, whose land shall be flowed as aforesaid, shall, on his filing his complaint for ascertaining or increasing his damages, or on bringing his action of debt as aforesaid, move the

said court to direct the owner or occupant of such mill to give security for the payment of the said damages from time to time, as they shall become due; and in that case, the said owner or occupant of such mill shall neglect or refuse to give such reasonable security as said court shall order, he shall have no benefit of this Act, but shall be liable to be sued for so flowing the lands of the complainant or plaintiff, in the same manner as though this Act had not been passed. And when the said jury shall so inquire of the said yearly damages, they shall also inquire and make return in their said verdict, what portion of the year the said lands ought not to be so flowed; and during such portion of the year as the said jury shall certify in their verdict, that the public convenience and the circumstances of the case do not justify such flowing, and the said verdict being accepted by the court, this Act shall in no manner authorize the said owner or occupant of such mill so to flow the said lands of others.

. . . . . .

Sec. 8. *And be it further enacted*, that every miller shall be provided with scales and weights to weigh corn, grain and meal to and from the mill, if required; and if he shall neglect to keep such scales and weights, or refuse so to weigh corn, grain and meal, when required, he shall be fined for each neglect or refusal, not exceeding five dollars, to be recovered, with costs, by action of debt by the parties suing, to his own use, before any Justice of the Peace of the county wherein the offence shall be committed.

Sec. 9. *And be it further enacted*, that the toll for grinding all sorts of grain shall not exceed one sixteenth part thereof.

Sec. 10. *And be it further enacted*, that this Act shall take effect and be in force on and after the first day of July

next, and that an Act passed A.D. seventeen hundred and six for the upholding and regulating of mills, and an Act made in addition thereto A.D. seventeen hundred and thirteen, and a third Act made in further addition thereto A.D. seventeen hundred and twenty-eight, shall on and after that date be repealed, except so far as they shall respect any complaints, actions, or meetings then pending by force thereof. Approved Feb. 27, 1796.

REVISED STATUTES OF MASSACHUSETTS, C. 116.

Of proceedings for the support and regulation of mills. Erection and regulation of mills.

Section 1. Any person may erect and maintain a water mill, and a dam to raise water for working it, upon and across any stream, that is not navigable, upon the terms and conditions, and subject to the regulations, hereinafter expressed.

Sect. 2. No such dam shall be erected, to the injury of any mill lawfully existing, either above or below it, on the same stream, nor to the injury of any mill site on the same stream, on which a mill or mill dam shall have been lawfully erected and used, unless the right to maintain a mill, on such last mentioned site, shall have been lost or defeated, by abandonment or otherwise; nor shall any mill or dam be placed on the land of any person, without such grant, conveyance or authority from the owner, as would be necessary by the common law, if no provision relating to mills had been made by statute.

. . . . . .

Sect. 4. Any person, whose land is overflowed, or otherwise injured by such dam, may obtain compensation

therefor, upon his complaint before the court of common pleas for the county where the land or any part thereof lies, provided, that no compensation shall be awarded for any damage, sustained more than three years before the institution of the complaint.

Sect. 5. The complaint shall contain such a description of the land, alleged to be flowed or injured, and such a statement of the damage, that the record of the case shall show, with sufficient certainty, the matter that shall have been heard and determined therein.

. . . . . .

Sect. 8. The respondent may plead in bar of the complaint, that the complainant has no estate or interest in the land, alleged to be flowed or injured, or that the respondent has a right to maintain his dam, for an agreed price, or without any compensation, or any other matter, which may show that the complainant cannot maintain the suit; but he shall not plead in bar of the complaint, that the land therein described is not injured by such dam.

. . . . . .

Sect. 15. The jury, in estimating the damage to the land of the complainant, shall take into consideration any damage, occasioned to his other land, by the dam, as well as the damage occasioned to the land overflowed, and they shall also allow, by way of set-off, the benefit, if any, occasioned by such dam to the complainant, in relation to his said lands.

. . . . . .

Sect. 17. If the jury find that the complainant is entitled to recover any damages, they shall assess the amount of such damages, sustained within three years next preceding the institution of the complaint, and down to the time of rendering the verdict, and if the verdict is allowed

and recorded by the court, the complainant shall have judgment and execution.

. . . . . .

Sect. 19. The jury shall also ascertain and determine by their verdict, what sum, if any, to be paid annually to the complainant, would be a just and reasonable compensation for the damages that shall be thereafter occasioned by the dam, so long as it shall be used in conformity with the verdict, and also what sum in gross would be a just and reasonable compensation for all the damages to be thereafter occasioned by such use of the dam, and for the right of maintaining and using the same forever, in manner aforesaid.

Sect. 20. The complainant in such case, at any time within three months after the verdict is allowed and recorded, may elect to take the sum in gross, so awarded by the jury, for the right to maintain and use the dam forever, instead of receiving the annual compensation therefor, and if he shall make such election, he shall, within the said three months, cause the same to be entered on the record of the case in the clerk's office.

Sect. 21. The owner or occupant of the mill or dam in such case shall, within three months after such election is entered on the record, pay to the complainant, or secure to his satisfaction, the sum so due for the perpetual right to maintain the dam, with interest from the time of the verdict; and after the expiration of said three months such owner or occupant shall lose all benefit of the provisions contained in this chapter, until the payment of said damages and interest.

Sect. 22. If the complainant shall not, within the said three months, cause an entry of his election to be made on the record, as before provided, he and all persons

claiming under him shall be entitled to demand and receive, from whoever shall be the owner or occupant of the mill, the annual compensation so established by the jury, so long as the dam shall be kept up and maintained, unless the sum due in that behalf shall be increased or diminished, upon a new complaint, as hereinafter provided.

Sect. 23. The person who shall be entitled to receive the said annual compensation, or gross damages, shall have a lien therefor from the time of the institution of the original complaint, on the mill and mill dam with their appurtenances, and the land under and adjoining the same and used therewith, provided, that such lien shall not extend to any sum due more than three years before the commencement of an action therefor.

Sect. 24. The party, entitled to the said annual compensation or gross damages, may maintain an action of assumpsit or debt therefor, in the court of common pleas, against the person who shall own or occupy the mill when the action is brought, and shall therein recover the whole sum due and unpaid for the three years then last past, whoever may have owned or occupied the mill during that time, and the plaintiff shall be entitled to his full costs in such suit, although the sum recovered shall not amount to twenty dollars.

Sect. 25. The execution issued on such judgment, if not otherwise satisfied, may, at any time within thirty days after the judgment is rendered, be levied on the premises so subject to the lien; and the officer may thereupon proceed to sell the same, or so much thereof, as shall be necessary to satisfy the execution, and all charges of levying it, and he shall proceed in making such sale, in like manner in all respects as is provided with regard to the sale on

execution of a right to redeem real estate that is mortgaged.

. . . . . .

Sect. 29. Every verdict, rendered in any proceeding under this chapter, shall be under the control of the court to which it is returned, and in like manner as in trials at the common law, and may be set aside for any sufficient cause; and in such cases a new trial shall be had, upon a new warrant or otherwise, as the case may require.

Sect. 30. No action shall be sustained at common law for the recovery of damages for the erecting, maintaining or using any mill or mill dam, except as is provided in this chapter.

. . . . . .

Sect. 59. Every miller, occupying and using a grist mill, shall be provided with scales and weights, or a vibrating steel yard, to weigh corn, grain and meal, to and from the mill, if required; and if he shall neglect to keep himself so provided, or shall refuse so to weigh corn, grain or meal, when required, he shall, for every such neglect or refusal, forfeit and pay to any person, who shall sue therefor, a sum not exceeding five dollars, to be recovered in an action on the case.

Statutes 1841, c. 18.

An Act in relation to direction and regulation of Mills.

Be it enacted by the Senate and House of Representatives in General Court assembled and by the authority of the same, as follows:

Sect. 1: No mill-dam shall hereafter be erected or raised to the injury of any mill site upon the same stream,

which shall have been occupied as such by the owner thereof, provided such owner shall, within a reasonable time after commencing said occupation, complete and put in operation a mill, for the working of which the water of such stream shall be applied.

Sect. 2: So much of the second section of the one hundred and sixteenth chapter of the Revised Statutes as is inconsistent with the provisions of this act, is hereby repealed.

Approved by the Governor, Feb. 10, 1841.

GENERAL STATUTES, c. 149.

Sect. 1, Any person may erect and maintain a water mill, and a dam to raise water for working it, upon and across any stream not navigable, upon the terms and conditions, and subject to the regulations, hereinafter expressed.

Sect. 2, No such dam shall be erected to the injury of any mill lawfully existing, either above or below it, on the same stream, nor to the injury of any mill-site on the same stream, on which a mill or mill-dam has been lawfully erected and used, unless the right to maintain a mill on such last-mentioned site has been lost or defeated by abandonment or otherwise; nor shall any mill-dam be hereafter erected or raised to the injury of any such mill-site which has been occupied as such by the owner thereof; *provided*, that such owner within a reasonable time after commencing such occupation completes and puts in operation a mill for the working of which the water of such stream shall be applied; nor shall any mill or dam be placed on the land of any person, without such grant, conveyance, or authority, from the owner, as would be neces-

sary by the common law if no provision relating to mills had been made by statute.

PUBLIC STATUTES OF MASSACHUSETTS, C. 190.

Erection and Maintenance of Mills and Mill-Dams.

Section 1. Any person may erect and maintain a water-mill, and a dam to raise water for working it, upon and across any stream not navigable, upon the terms and conditions and subject to the regulations hereinafter expressed.

Sect. 2. No such dam shall be erected to the injury of a mill lawfully existing, either above or below it, on the same stream, nor to the injury of a mill-site on the same stream on which a mill or mill-dam has been lawfully erected and used, unless the right to maintain a mill on such last-mentioned site has been lost or defeated by abandonment or otherwise; nor shall a mill-dam be hereafter erected or raised to the injury of any such mill-site which has been occupied as such by the owner thereof, if such owner within a reasonable time after commencing such occupation completes and puts in operation a mill for the working of which the water of such stream is applied; nor shall a mill or dam be placed on the land of any person without such grant, conveyance, or authority from the owner as would be necessary by the common law if no provision relating to mills had been made by statute.

Sect. 3. The height to which the water may be raised, and the length of time, or period, for which it may be kept up in each year, shall be liable to be restricted and regulated by the verdict of a jury.

Sect. 4. A person, whose land is overflowed or otherwise injured by such dam, may obtain compensation there-

for upon his complaint before the superior court for the county where the land or any part thereof lies; but no compensation shall be awarded for damage sustained more than three years before the institution of the complaint.

Sect. 5. The complaint shall contain such description of the land alleged to be flowed or injured, and such statement of the damage, that the record of the case will show with sufficient certainty the matter heard and determined therein.

Sect. 6. The complaint may be filed in the court in term time, or in the clerk's office in vacation, and in either case notice thereof shall be given to the owner or occupant of the mill by delivering to him, or leaving at his dwelling-house, an attested copy of the complaint; or if he is not found within the commonwealth, and has no dwelling-house therein, by leaving such copy at the mill in question fourteen days at least before the complaint is to be heard; or the complainant may, fourteen days at least before the sitting of the court to which his complaint is brought, cause the owner or occupant of such mill or dam to be served with an attested copy of the complaint by delivering or leaving such copy in like manner as when the complaint is filed as aforesaid.

Sect. 7. The notice shall be served by an officer authorized to serve other civil processes between the same parties.

Sect. 8. The respondent may answer in bar that the complainant has no estate or interest in the land alleged to be flowed or injured, that the respondent has a right to maintain his dam for an agreed price or without any compensation, or any other matter which may show that the complainant cannot maintain the suit; but the respondent shall not answer that the land described is not injured by the dam.

Sect. 9. If a plea or answer is filed by the respondent, the replication and other pleadings, and the trial of the issue, whether of law or of fact, shall be conducted in like manner as in actions at common law.

Sect. 10. If an issue is decided in favor of the respondent, or if the complainant becomes nonsuit or discontinues, the respondent shall be entitled to his costs, to be taxed as in civil actions.

Sect. 11. If the owner or occupant of the mill or dam, after due notice, is defaulted or offers no legal objection, or if an issue is decided in favor of the complainant, the court shall issue a warrant for a jury to hear and determine the matter of the complaint.

Sect. 12. Such warrant shall be directed and served, and the jurors shall be drawn, summoned, and returned, in the manner provided in chapter forty-nine with respect to a jury returned on the complaint of a person aggrieved by the laying out of a highway, and the jurors shall be required to attend under a like penalty, and the proceedings for supplying a deficiency of jurors and all other proceedings in the case shall be substantially the same as are provided in said chapter.

Sect. 13. If the parties so agree by writing filed in the case, the trial may be had before a jury in the superior court as in other civil actions, and in such case, if either party requires it, the jury shall view the premises alleged to be injured, subject to such regulations and terms as the court may prescribe.

Sect. 14. The jury, in estimating the damage to the land of the complainant, shall take into consideration any damage occasioned by the dam to his other land, as well as the damage occasioned thereby to the land overflowed; and they shall also allow by way of set-off any benefit

occasioned by such dam to the complainant in relation to his lands.

Sect. 15. If the jury find by their verdict that the complainant is not entitled to recover any damages, and if such verdict is allowed and recorded, judgment shall be rendered for the respondent.

Sect. 16. If they find that the complainant is entitled to recover damages, they shall assess the amount of damages sustained within three years next preceding the institution of the complaint and to the time of the rendering of the verdict, and, if the verdict is allowed and recorded, the complainant shall have judgment and execution for the amount of damages so assessed.

Sect. 17. If it is alleged in the complaint that the dam is raised to an unreasonable height, or that it ought not to be kept up and closed during the whole year, the jury shall decide how much, if any, the dam shall be lowered, and also whether it shall be left open during any part of the year, and, if so, during what part, and shall state such decision as a part of their verdict.

Sect. 18. They shall also ascertain and determine by their verdict what sum, if any, to be paid annually to the complainant, would be a just and reasonable compensation for the damages that may be thereafter occasioned by the dam, so long as it is used in conformity with the verdict; and also what sum in gross would be a just and reasonable compensation for all damages thereafter to be occasioned by such use of the dam and for the right of maintaining and using the same forever in manner aforesaid.

Sect. 19. The complainant may in such case, at any time within three months after the verdict is allowed and recorded, elect to take the sum so awarded in gross for

the right to maintain and use the dam forever, instead of receiving the annual compensation therefor; and if he makes such election, he shall within said three months cause the same to be entered on the record of the case in the clerk's office.

Sect. 20. The owner or occupant of the mill or dam shall, within three months after such election is thus entered, pay to the complainant, or secure to his satisfaction, said sum with interest from the time of the verdict. After the expiration of said three months, and until payment of said damages and interest, such owner or occupant shall lose all benefit of the provisions contained in this chapter.

Sect. 21. If the complainant does not within said three months cause such entry of his election to be made on the record, he and all persons claiming under him shall, so long as the dam is kept up and maintained, be entitled to demand and receive from the owner or occupant of the mill the annual compensation so established by the jury, unless the sum is increased or diminished upon a new complaint as hereinafter provided.

Sect. 22. The person entitled to receive said annual compensation or gross damages shall have a lien therefor, from the time of the institution of the original complaint, on the mill and mill-dam with their appurtenances, and on the land under and adjoining the same and used therewith; but such lien shall not extend to any sum due more than three years before the commencement of an action therefor.

Sect. 23. Such person may maintain an action of contract therefor in the superior court against the person who owns or occupies the mill when the action is brought, and shall in such action recover the whole sum due and unpaid for the three years then last past, whoever has owned or

occupied the mill during that time; and he shall be entitled to full costs, although the sum recovered does not amount to twenty dollars.

Sect. 24. The execution issued on such judgment may, at any time within thirty days after the judgment is rendered, be levied on the premises so subject to the lien; and the officer may thereupon proceed to sell such premises, or so much thereof as is necessary to satisfy the execution and all charges of levying it. The officer shall proceed in making the sale in like manner in all respects as is provided with regard to the sale on execution of a right to redeem real estate mortgaged, and the sale shall be valid and effectual against all persons claiming the premises by any title that has accrued within the time covered by the lien.

Sect. 25. Any person entitled to the premises so sold may redeem the same at any time within one year after the sale, upon paying to the purchaser, or to the person holding under him, the sum paid therefor, with interest at the rate of twelve per cent a year.

Sect. 26. The court to which a verdict upon a complaint for flowing land is returned may set it aside for any sufficient cause, and may grant a new trial to be had upon a new warrant or otherwise as the case may require.

Sect. 27. The party prevailing upon such a complaint shall be entitled to his full costs, except where it is otherwise expressly provided. The court shall award a reasonable compensation to the person who presides at the trial, when it is had before a sheriff's jury, and to the officer who executes the warrant, and the amounts so awarded shall, with the pay of the jurors and other like charges, be advanced by the complainant, and taxed and allowed in the bill of costs.

Sect. 28. No action shall be sustained at common law for the recovery of damages for the erecting, maintaining, or using of a mill or mill-dam, except as is provided in this chapter.

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Duties and Compensation of Millers.

Sect. 71. Every miller occupying and using a grist-mill shall be provided with scales and weights or with a vibrating steelyard to weigh corn, grain, and meal, to and from the mill, if required; and if he neglects to keep himself so provided, or if he refuses so to weigh corn, grain, or meal, when required, he shall for every such neglect or refusal forfeit to any person who sues therefor a sum not exceeding five dollars, to be recovered in an action of tort.

Sect. 72. The toll for grinding any sort of grain shall not exceed one-sixteenth part thereof.

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